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1344

United States

1344

# Circuit Court of Appeals

For the Ninth Circuit.

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H. ALLEN RISPIN,

Plaintiff in Error,

vs.

THE MIDNIGHT OIL COMPANY, a Corpora-  
tion,

Defendant in Error.

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## Transcript of Record.

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Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
Second Division.

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FILED

MAR 27 1923

F. D. MONCKTON,  
CLERK.







**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

A. L. WEIL, Esq., and FORREST A. COBB, Esq.,  
1202 Alaska Commercial Bldg., San Francisco,  
Calif.,

Attorneys for Plaintiff in Error.

DUDLEY D. SALES, Esq., 58 Sutter St., San Francisco, Calif.,

Attorney for Defendant in Error.

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In the District Court of the United States for the  
Northern District of California.

No. 16718.

THE MIDNIGHT OIL COMPANY, a Corporation,  
Plaintiff,

vs.

H. ALLEN RISPIN,

Defendant.

**Complaint.**

Plaintiff complains and alleges:

I.

That at all times hereinafter mentioned plaintiff, the Midnight Oil Company, was and is now a corporation, organized and existing under the laws of the State of Colorado and having its principal place of business in the City and County of Denver, Colorado.

II.

That defendant, H. Allen Rispin (whose first



name is unknown to plaintiff), is now a citizen of the State of California and a resident of Santa Cruz County, in the Northern District of the State of California.

### III.

That this is a civil suit for the recovery of a money judgment and that the amount involved herein, exclusive of interest and costs, exceeds the sum of Three Thousand (\$3,000) Dollars.

### IV.

That heretofore, and on or about the 13th day of May, 1919, there was pending in the District Court of the Second Judicial District in and for the City and County of Denver, State of Colorado, a suit wherein plaintiff herein was plaintiff and defendant herein, together with Wyoming Montana Development Company, were defendants. That plaintiff herein agreed with defendant herein to, and did, dismiss, settle and compromise [1\*] said suit, in consideration whereof defendant herein agreed to pay plaintiff the sum of Ten Thousand (\$10,000) Dollars, upon the terms and conditions set forth in a written instrument signed by said defendant on said 13th day of May, 1919, which is in words and figures, as follows, to wit:

“WHEREAS, a certain action is now pending in the District Court of the City and County of Denver, State of Colorado, wherein the Midnight Oil Company is plaintiff, and H. A. Rispin and Wyoming-Montana Development Company are defendants, and

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\*Page-number appearing at foot of page of original certified Transcript of Record.

WHEREAS, it is the desire of all the parties to said action that the same be compromised and settled, and

WHEREAS, the Hopewell Oil Company has assigned to the Midnight Oil Company part of the benefits arising from an operating contract bearing date of March 24th, 1919, between the Hopewell Oil Company as grantor, and the Associated Oil Company, as operator, of and on the West half (W.  $\frac{1}{2}$ ) of the Northwest quarter (NW.  $\frac{1}{4}$ ) of Section Seventeen (17) and the East half (E.  $\frac{1}{2}$ ) of the Northeast quarter (NE.  $\frac{1}{4}$ ) of Section eighteen (18), Township Thirty-five (35) North, Range sixty-five (65) West of the Sixth P. M., situate in the County of Niobrara and State of Wyoming, and

WHEREAS, the first well to be drilled on said above described premises by the terms of said contract is to be located and is located on the premises assigned to the Midnight Oil Company, and by said contract said Associated Oil Company has agreed to prosecute the work of drilling the said well continuously, barring unavoidable delays, until such well shall reach the depth of and test out the known productive oil sands in the Lance Creek Field, unless oil shall be found in commercial quantities at a lesser depth.

NOW, THEREFORE, and as a part of the consideration in the settlement of the above-entitled action, the undersigned hereby [2] guarantees that the said Associated Oil Company, or its assigns, will drill and complete a well on said last above-described premises commencing on or before

the 15th day of June, 1919, with a rig capable of reaching a depth of four thousand (4,000) feet, and shall prosecute the well continuously thereafter, barring unavoidable delays, until such well shall reach the depth of and test out the known productive oil sands in the Lance Creek Field, unless oil in commercial quantities shall be found in said well at a lesser depth, the cost of drilling and equipping said well shall be entirely at the cost of the said Associated Oil Company, or its assigns.

And should the said Associated Oil Company, or its assigns, for any reason, fail to drill and complete said well in manner and form as above specified, then and in that event and because the damage occasioned thereby to the Midnight Oil Company would be difficult, if not impossible to ascertain, and in consideration of the settlement and dismissal of said above suit, the undersigned, H. A. Rispin, agrees to pay to the said the Midnight Oil Company, the sum of Ten Thousand (\$10,000) Dollars as liquidated damages the same to be paid on notice of the failure of the said the Associated Oil Company, or its assigns, to drill and complete said well as above specified.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this 13th day of May, A. D. 1919.

(Signed) H. ALLEN RISPIN. (Seal)"

V.

That neither said Associated Oil Company, nor its assigns, on or before the 15th day of June, 1919, or at any time since the 13th day of May, 1919, drilled or completed or commenced or prosecuted



the drilling of a well on the premises described in said written instrument, but on the contrary failed to commence to drill or to drill and failed to complete a well on said described premises in the manner and form specified in said written [3] instrument, or in any other manner or form or at all.

#### VI.

That heretofore and on or about the 10th day of February, 1920, plaintiff notified defendant in writing that such well had not been drilled or completed as provided for in said written instrument or at all and demanded that defendant pay to plaintiff said sum of Ten Thousand (\$10,000) Dollars as liquidated damages pursuant to the terms of said written instrument.

#### VII.

That defendant has at all times failed and refused to pay to plaintiff said sum of Ten Thousand (\$10,000) Dollars, or any part thereof.

#### VIII.

That it would be, was and is impracticable and extremely difficult to fix the actual damages which would be suffered or was suffered by the plaintiff by reason of the failure of said Associated Oil Company, or its assigns, to drill or to commence to drill a well on said premises as guaranteed by defendant herein.

WHEREFORE plaintiff prays judgment against defendant in the sum of Ten Thousand (\$10,000.00) Dollars, together with interest thereon at the rate

of 8% per annum from February 10th, 1920, and for costs of suit.

DANA, BLOUNT & SILVERSTEIN,  
DUDLEY D. SALES,

Attorneys for Plaintiff. [4]

State of California,

City and County of San Francisco,—ss.

Dudley D. Sales, being first duly sworn, deposes and says: That he is one of the attorneys for the Midnight Oil Company, a corporation, plaintiff in the above-entitled action and makes this affidavit in its behalf for the reason that there are no officers of the plaintiff company present in the State of California where affiant has his offices; that affiant has read the foregoing complaint and knows the contents thereof; that affiant is informed and believes and upon such information and belief states the fact to be that the matters and facts set forth in said complaint are true.

DUDLEY D. SALES.

Subscribed and sworn to before me this 6th day of April, 1922.

[Seal]

CHARLES E. RUTH,

Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed Apr. 8, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [5]

(Title of Court and Cause.)

**Demurrer**

Comes now the defendant in the above-entitled action, and demurs to the complaint of plaintiff on file herein and for grounds of demurrer alleges:

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

WHEREFORE defendant prays that plaintiff take nothing by its action, and that he be hence dismissed with his costs.

A. L. WEIL,  
FORREST A. COBB,  
Attorneys for Defendant.

Receipt of copy of the within demurrer is hereby acknowledged this 5th day of May, 1922.

DUDLEY D. SALES,  
Attorney for Plaintiff.

[Endorsed]: Filed May 8, 1922. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [6]

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At a stated term, to wit, the March term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 22d day of May in the year of our Lord one thousand nine hundred and twenty-two—Present: The Honorable WILLIAM C. VAN FLEET, District Judge.



(Title of Cause.)

**Minutes of Court—May 22, 1922—Order Overruling  
Demurrer to Complaint.**

Defendant's demurrer to complaint came on to be heard and after arguments being submitted it is ordered that the said demurrer be and is hereby overruled. [7]

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(Title of Court and Cause.)

**Amended Answer.**

Comes now the defendant above named, and, by leave of the court first had and obtained, files this as and for his amended answer to the complaint of plaintiff on file herein, and admits, alleges and denies as follows:

**I.**

Alleges that on March 24, 1919, The Western States Oil and Land Company, a corporation, made, executed and delivered to The Hopewell Oil Company, a corporation, a certain lease, covering, among others, the lands referred to in the agreement set out in paragraph IV of plaintiff's complaint, copy of which lease is attached hereto, marked Exhibit "A" and is hereby made a part hereof.

**II.**

Alleges that on March 24, 1919, said The Hopewell Oil Company, a corporation, entered into a contract in writing with Associated Oil Company,

a corporation, covering the same lands described in said Exhibit "A," copy of which contract is attached hereto, marked Exhibit "B" and is hereby made a part hereof.

III.

Alleges that on May 12, 1919, said The Hopewell Oil Company, assigned to plaintiff herein all its right, title and interest in and to the lands referred to in said paragraph of said complaint and arising out of said lease referred to in paragraph I above, and also all of the royalties and benefits accrued or thereafter accruing to said The Hopewell Oil Company from said Associated Oil Company by virtue of said contract referred to in paragraph II above, by an instrument in writing, copy of which is attached hereto and marked Exhibit "C" and is hereby made a part hereof, [8]

IV.

Alleges that Exhibit "C" attached hereto is the assignment referred to in the third paragraph of the instrument set out in paragraph IV of plaintiff's complaint; alleges that Exhibits "A" and "B" attached hereto are the instruments referred to in said Exhibit "C."

V.

Alleges that said Associated Oil Company was ready, able and willing to commence the drilling and completion of a well on the premises described in plaintiff's complaint on and before the 15th day of June, 1919; that plaintiff was unable, and failed, refused and neglected to deliver possession of same to said Associated Oil Company on or before said

date; that on or before said date, said Associated Oil Company attempted to secure possession of said premises but was prevented from so doing by threats of bodily harm to its servants and by forcible opposition on the part of persons claiming said premises adversely to plaintiff; that said Associated Oil Company has never been able to enter upon said premises; that except for plaintiff's said failure to deliver possession of said premises as aforesaid, said Associated Oil Company would have drilled and completed a well on said premises commencing on or before the 15th day of June, 1919, with a rig capable of reaching a depth of 4000 feet, and would have prosecuted the work of drilling said well continuously thereafter, barring unavoidable delays, until such well would have reached the depth of and tested out the known productive oil sands in the Lance Creek Field, unless oil in commercial quantities should have been found in said well at a lesser depth, and said Associated Oil Company would have paid the entire cost of drilling and equipping said well.

#### VI.

Alleges that said Associated Oil Company was barred by delays unavoidable on its part, from drilling or commencing to drill a [9] well on said premises, on or before said 15th day of June, 1919.

#### VII.

Alleges on information and belief that during the time when said Associated Oil Company was excluded from said premises, as aforesaid, wells have been drilled on the geologic structure underlying



said premises and said wells have reached the depth of and tested out the known productive oil sands in the Lance Creek Field, and have demonstrated that oil in commercial quantities does not exist under said premises; alleges that plaintiff has sustained no damage of any kind or nature by reason of anything set forth in its complaint on file herein.

### VIII.

Answering the allegations contained in paragraph VIII of said complaint, defendant denies that it would be, was, and is, or would be or was or is impracticable and extremely difficult or impracticable or extremely difficult to fix the actual damage which would be or was suffered by the plaintiff by reason of the failure of said Associated Oil Company, or its assigns, to drill or to commence to drill a well on said premises, and in that behalf, defendant alleges that at the time of executing the agreement set forth in plaintiff's complaint, and at all times since, it always has been and now is an extremely simple and easy matter to exactly compute any damages which might occur or have occurred to plaintiff by reason of such failure to drill a well within the time limited;

WHEREFORE, defendant prays that plaintiff take nothing by its said action and that defendant be hence dismissed with its costs of suit herein expended.

A. L. WEIL,  
FORREST A. COBB,  
Attorneys for Defendant. [10]

State of California,

City and County of San Francisco,—ss.

H. Allen Rispin, being first duly sworn, deposes and says:

That he is the defendant named in the above-entitled action; that he has read the foregoing amended answer and knows the contents thereof and the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

H. ALLEN RISPIN.

Subscribed and sworn to before me this 27th day of July, 1922.

[Seal]

FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California. [11]

**Exhibit "A".**

This agreement, made and entered into this 24th day of March, A. D. 1919, by and between The Western States Oil and Land Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, party of the first part, hereinafter called the Lessor, and The Hopewell Oil Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, party of the second part, hereinafter called the Lessee,—

**WITNESSETH:**

That for and in consideration of the covenants

and agreements hereinafter expressed to be fully kept and performed by the lessee, the lessor has leased, let and demised, and by these presents does lease, let and demise unto the lessee all of those certain pieces or parcels of land situate in the County of Niobrara and State of Wyoming, more particularly described as follows, to wit:

The West one-half (W.  $\frac{1}{2}$ ) of the Northwest quarter (NW.  $\frac{1}{4}$ ), and the North one-half (N.  $\frac{1}{2}$ ) of the Southwest quarter (SW.  $\frac{1}{4}$ ) of Section Seventeen (17), Township Thirty-five (35) North, Range Sixty-five (65) West of the Sixth Principal Meridian; also The East one-half (E.  $\frac{1}{2}$ ) of the Northeast quarter (NE.  $\frac{1}{4}$ ), and the North one-half (N.  $\frac{1}{2}$ ) of the Southeast quarter (SE.  $\frac{1}{4}$ ) of Section Eighteen (18), Township Thirty-five (35) North, Range Sixty-five (65) West of the Sixth Principal Meridian.

The lessor has furthermore demised and leased, and by these presents does demise and lease unto the said lessee all of the oil, gas, water and minerals of every kind and description in and under said lands and the right to sever and remove the same; also the right to construct and maintain telegraph and [12] telephone lines, pipe lines and roadways on or across the demised premises from adjoining lands; the right to erect and maintain buildings, derricks, tanks and other structures used and necessary for drilling for, producing, handling and selling the oil, gas, water and other minerals produced on said lands.



TO HAVE AND TO HOLD unto the said lessee for the full term of fifteen (15) years, and as long thereafter as oil, gas or other minerals are produced thereon in paying quantities by the lessee, or its assigns, provided all the covenants and agreements herein are fully kept and performed by said lessee.

The lessee agrees to immediately take possession of said premises, and to within sixty (60) days from the date hereof place thereon drilling materials, and to begin actual drilling of an oil well thereon on or before the 15th day of June, 1919, with a rig capable of reaching a depth of four thousand (4,000) feet; that it will prosecute the work of drilling continuously thereafter, barring unavoidable delays, until such well shall reach the depth of and test out the known productive oil sands in the Lance Creek Field, unless oil in commercial quantities shall be found in said well at a less depth. Should oil or gas in commercial quantities be produced in said first well drilled, then the lessee shall thereafter continue to drill and develop said premises for oil and gas as rapidly and as fully as is consistent with good management, and as conditions in the field will permit. Should said first well drilled, or should any later well drilled on said premises by the lessee prove unproductive of oil or gas in commercial quantities, the lessee shall have the right, on executing proper assignment or quitclaim deed of said lands in favor of the lessor, to surrender to the lessor all the lessee's rights and interests

in said lands, and in this lease, and the lessee shall thereafter be relieved from any further liability or obligation under this lease.

The lessee agrees to deliver as royalty to the lessor [13] one-eighth ( $\frac{1}{8}$ ) part of all crude oil, natural gas and other minerals produced and saved from said premises, the oil and gas to be delivered to the lessor free of charge, either in the pipe line or in tanks on said premises, or at the option of the lessor said royalty shall be paid to it in cash, the royalty to be in that case the value of one-eighth ( $\frac{1}{8}$ ) part of all the oil, gas and other minerals produced and saved from said lands, payment to be made on or about the 20th day of each month for all royalty products sold and disposed of during the preceding calendar month.

The lessee agrees to protect the land hereby leased against all claims for material and labor, and agrees to do all necessary assessment work on said lands on or before October 31st of each year, as long as said work is required by law to be performed, or as long as this lease is retained by the lessee.

In the event of a producing well being drilled, or having been drilled on adjacent lands within a linear distance of 400 feet from the boundary line of the premises hereby leased, the lessee agrees to immediately drill and complete a suitable offset well, or wells, to protect and conserve to the lessor and the lessee the oil and other kindred products of said demised premises. Should the lessee, its successors or assigns, fail to so commence drilling such

offset well, or wells, within sixty (60) days after notice in writing by the lessor to the lessee so to do, the lessor shall have the right to enter on said premises and drill said well, or wells, at its own proper cost and expense, and take unto itself the entire product thereof.

The lessee agrees to keep accurate logs of all wells drilled on said premises, and to keep full and accurate accounts of all production, all of which shall be open to the inspection of the lessor at all times.

It is agreed that in the event of the termination of this lease by forfeiture, or otherwise, or by abandonment of said premises, the lessee shall have the right to remove from said [14] premises all its tools, machinery, casing, tanks, building, pipe lines, derricks, and other property on said lands, or any part thereof.

It is understood between the parties hereto that the lessor claims the land hereby leased under and by virtue of a certain lease dated the 22d day of January, 1917, and recorded on the 16th day of April, 1917, in Book 23, at page 449 of the records of the office of the County Clerk and *Ex-officio* Register of Deeds of Niobrara County, Wyoming, wherein W. W. Wright, and others, are lessors, and the lessor herein is lessee, which lease is by reference incorporated herein and made a part of this lease, with the same effect as though fully written herein, and the lessee herein hereby covenants and agrees to fully carry out and perform all the terms and conditions of said lease required to be



performed by the lessee therein, except the provisions therein for the payment of royalty.

In the event that the lessee herein shall by reason of this lease acquire a preferential right to lease, or shall lease the lands herein described from the United States Government under any Act of Congress which may be passed authorizing or requiring such leasing by the Government, it is understood and agreed that such preferential right to lease, or any such lease gotten by the lessee herein, shall be taken by the lessee herein for the benefit of the parties hereto as shown by the terms and provisions of this lease.

If the lessee shall at any time fail or neglect to perform promptly any of the things to be done or performed by it under this lease, then the lessor shall have the option to cancel and annul this lease, and thereupon all the rights of the lessee in and to the land herein described, or any part thereof, shall be terminated, and the lessor may re-enter the said premises and take possession of the same, in all respects as though this lease had never been executed. [15]

The provisions, conditions, covenants and agreements herein contained shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by their

duly authorized officers in duplicate originals, this 24th day of March, A. D. 1919.

THE WESTERN STATES OIL AND LAND  
COMPANY.

By \_\_\_\_\_,  
President.

[Seal] Attest: \_\_\_\_\_,  
Secretary.

Witnesses:

\_\_\_\_\_  
\_\_\_\_\_

THE HOPEWELL OIL COMPANY.

By \_\_\_\_\_,  
President.

[Seal] Attest: \_\_\_\_\_,  
Secretary.

Witnesses:

\_\_\_\_\_  
\_\_\_\_\_ [16]

State of Colorado,  
City and County of Denver,—ss.

On this 25th day of March, A. D. 1919, before me appeared N. S. Wilson and C. E. Titus, to me personally known, who being by me duly sworn did say that they are respectively the President and Secretary of The Western States Oil and Land Company, a corporation; that the seal affixed to the above and foregoing instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said N. S. Wilson, as its President, and said C. E.

Titus, as its Secretary, acknowledged said instrument to be the free act and deed of said corporation.

Given under my hand and Notarial seal this 25th day of March, 1919.

My commission expires Jan. 8, 1920.

[Seal] CHRISTABEL E. E. SCOVILLE,  
Notary Public. [17]

**Exhibit "B."**

**OPERATING AGREEMENT.**

THIS AGREEMENT, Made and entered into this twenty-fourth day of March, 1919, by and between the Hopewell Oil Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, party of the first part, and Associated Oil Company, a corporation organized and existing under and by virtue of the laws of the State of California, party of the second part, WITNESSETH:

WHEREAS, the party of the first part is the lessee in a certain Oil and Gas Lease dated the 24th day of March, 1919, between The Western States Oil and Land Company, a Colorado corporation, as lessor, and The Hopewell Oil Company, as lessee, whereby said lessor leases to the lessee certain tracts or parcels of land, situated in the County of Niobrara and State of Wyoming, together with the oil, gas, water and minerals underlying the same, more particularly described as follows, to wit:

The West one-half (W.  $\frac{1}{2}$ ) of the Northwest quarter (NW.  $\frac{1}{4}$ ), and the North half (N.  $\frac{1}{2}$ )



of the Southwest quarter (SW.  $\frac{1}{4}$ ) of Section Seventeen (17), Township Thirty-five (35) North, Range Sixty-five (65) West of the Sixth Principal Meridian, and the East half (E.  $\frac{1}{2}$ ) of the Northeast quarter (NE.  $\frac{1}{4}$ ), and the North half (N.  $\frac{1}{2}$ ) of the Southeast quarter (SE.  $\frac{1}{4}$ ) of Section Eighteen (18), Township Thirty-five (35) North, Range Sixty-five (65) West of the Sixth Principal Meridian.

AND WHEREAS, the party of the first part desires to arrange for the operation and development of said lands for oil, gas and other minerals, under the terms of said lease.

NOW, THEREFORE, the party of the first part does by these [18] presents assign and transfer unto the said party of the second part all its right, title and interest in and to said lands, under and by virtue of said lease and subject to the terms thereof, for the additional consideration and upon the terms and conditions hereinafter stated:

AND IT IS HEREBY MUTUALLY AGREED as follows:

1. The said party of the first part shall immediately deliver possession of said lands to the party of the second part for operation under the terms of said lease, and under the terms of this agreement.

2. The party of the second part shall immediately take possession of and shall have the complete management and control of the lands above described, and of the development and operation thereof, and shall proceed to develop the same for oil and gas,

in accordance with and under the terms of said lease.

3. Said party of the second part shall furnish the capital and pay all the expenses and costs incurred in the development, equipment and operation of said lands, and of the protection and maintenance of the oil placer mining claims constituting the basis of the title on which the aforesaid lease is granted, and shall within sixty days from the date hereof place on said lands drilling materials, and shall begin actual drilling of an oil well thereon on or before the 15th day of June, A. D. 1919, with a rig capable of reaching a depth of four thousand (4000) feet, and shall prosecute the work of drilling said well continuously thereafter, barring unavoidable delays, until such well shall reach the depth of and test out the known productive oil sands in the Lance Creek oil field, unless oil in commercial quantities shall be found in said well at less depth. The cost of drilling and equipping said first well shall be borne entirely by the party of the second part, free of all cost or charge against the party of the first part herein.

4. In the operation of said premises under said lease [19] thereafter, the party of the second part shall charge forty (40%) per cent of all the cost and expenditure thus incurred to the party of the first part, and the party of the second part shall be reimbursed by the party of the first part thereof only from the first party's portion of the proceeds of oil and gas produced and sold from said premises. The second party shall market all crude oil and

marketable natural gas produced from said premises, and shall keep accurate accounts of such oil and gas so marketed from said lands and account to the party of the first part for forty (40%) per cent of the net proceeds of the same, at the price received therefor, after deducting said forty (40%) per cent of all the cost and expenditure thus incurred, together with interest thereon at the rate of six per cent per annum from the time said money is advanced until it is reimbursed in the manner herein provided. It is, however, understood and mutually agreed, that said advancements shall not be considered as a debt recoverable against the party of the first part but shall be subject to reimbursement out of the forty (40%) per cent of the proceeds of the product of said wells herein reserved to the party of the first part only, and conditioned upon there being sufficient such proceeds to make said reimbursement; and it is further mutually agreed, that said reimbursement shall be the actual cost and outlay only, and reasonable in amount, including a reasonable charge for book-keeping (not exceeding fifteen dollars for month per well), and shall include no overhead or corporate charges.

5. The party of the second part hereby agrees to render to the party of the first part monthly statements showing the monthly cost of development and operation of said property, and the wells thereon, from and after the time oil or gas is marketed from said premises, and remit monthly to the party of the first part for its forty (40%) per

cent portion of the proceeds of any oil and gas produced and sold from said premises after deducting the amount necessary to reimburse the party of the second part for cost of [20] operation and development, with interest as hereinabove provided.

6. The parties hereto shall co-operate at all times and in all ways in maintaining, protecting and perfecting the titles under which they hold the above described lands by said lease, to the end that the interests of the parties here shall be mutually protected.

7. Whenever in the judgment of the party of the second part any part or portion of the above described lands shall be beyond the water line, or nonproductive of oil or gas in paying commercial quantities, said party of the second part shall have the right, on executing proper assignment or quitclaim deed of any such lands, or lands in favor of said party of the first part, and on fully accounting to that date to surrender the same to said party of the first part, and the party of the second part shall thereafter be relieved from any further liability hereunder in connection with the development and operation of any such land, or lands, so surrendered.

8. The party of the second part hereby covenants and agrees to fully carry out and perform promptly all the terms and conditions to be performed on the party of the lessee in the lease hereby assigned, under which said lands are held.



9. The provisions, conditions, covenants and agreements herein contained shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed by their duly authorized officers in duplicate originals, this 24th day of March, A. D. 1919.

**THE HOPEWELL OIL COMPANY.**

By \_\_\_\_\_,  
President.

[Seal] Attest: By \_\_\_\_\_,  
Secretary.

Witness:

\_\_\_\_\_  
\_\_\_\_\_.

**ASSOCIATED OIL COMPANY. [21]**

By \_\_\_\_\_,  
Vice-President.

[Seal] Attest: By \_\_\_\_\_,  
Assistant Secretary of Said Company.

\_\_\_\_\_  
\_\_\_\_\_.

State of Colorado,

City and County of Denver,—ss.

On this 25th day of March, A. D. 1919, before me personally appeared George C. Manly and B. E. Thompson, to me personally known, who being by me first duly sworn, did say that they are respectively the President and the Secretary of the Hopewell Oil Company, a corporation; that the seal affixed to the above and foregoing instrument is the

corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by the authority of its Board of Directors, and that George C. Manly as its President, and B. E. Thompson as its Secretary, acknowledged said instrument to be the free act and deed of said corporation.

Given under my hand and notarial seal this 25th day of March, A. D. 1919.

My Commission expires March 31, 1919.

[Seal]                      HENRY N. BENNETT, Jr.,  
Notary Public. [22]

State of California,

City and County of San Francisco,—ss.

On this 22d day of April, in the year one thousand nine hundred and nineteen, before me, Charles R. Holton, a notary public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared A. C. McLaughlin and J. P. Edwards known to me to be the vice-president and assistant secretary respectively of the Associated Oil Company, the corporation that executed the within and foregoing instrument, and to be the officers who executed the said instrument on behalf of said corporation therein named, and they acknowledged to me that said corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the said City and County of San Francisco, the

day and year in this certificate last above written.

[Seal]

CHARLES R. HOLTON,

Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires Sept. 16, 1922. [23]

**Exhibit "C."**

**ASSIGNMENT OF LEASE AND OPERATING  
CONTRACT.**

KNOW ALL MEN BY THESE PRESENTS,  
That The Hopewell Oil Company, a corporation  
organized and existing under and by virtue of the  
laws of the State of Colorado, as party of the first  
part, in consideration of the sum of one dollar and  
other good and valuable considerations, to it in  
hand paid by The Midnight Oil Company, a cor-  
poration organized and existing under and by  
virtue of the laws of the State of Colorado, the  
receipt of which said consideration is hereby ac-  
knowledged, has sold, assigned, transferred and  
set over, and by these presents does sell, transfer,  
assign and set over unto the said The Midnight Oil  
Company all its right, title and interest in and  
to the following described lands, to wit:

The west half of the northwest quarter of  
Section seventeen (17) and the east half of the  
northeast quarter of Section eighteen (18) in  
Township thirty-five (35) north of Range 65  
West of the Sixth Principal Meridian, situate  
in the County of Niobrara and State of Wyo-  
ming,

arising from and out of the original indenture of  
lease bearing date the 24th day of March, 1919,

wherein The Western States Oil and Land Company is the lessor, and the above mentioned The Hopewell Oil Company is the lessee; and also all of the royalties and benefits accrued or hereafter accruing to The Hopewell Oil Company from "Associated Oil Company," a corporation organized and existing under and by virtue of the laws of the State of California, by virtue of a written contract between the two companies last above mentioned bearing date the 24th day of March, 1919, the same being a contract whereby "Associated Oil Company" agrees to develop and operate the lands above described and others.

The above Assignment of Lease and assignment of benefits arising out of the said operating contract is made in respect only to the lands above described, The Hopewell Oil Company reserving [24] for itself the north half of the Southwest quarter of Section seventeen (17) and the north half of the southeast quarter of Section eighteen (18), Township thirty-five (35) north of Range 65 West of the Sixth Principal Meridian, situate in the County of Niobrara, in the State of Wyoming, both as respects the rights of The Hopewell Oil Company, as Lessee, and in respect to the benefits arising from said operating contract; the purpose of this agreement being to subdivide both said lease and the said operating contract as above set forth.

TO HAVE AND TO HOLD by the said The Midnight Oil Company, its successors and assigns, subject, however, to all the terms, conditions, agreements, covenants and royalties expressed in said



lease, which said terms, conditions, agreements, covenants and royalties, The Midnight Oil Company agrees to keep, perform and pay so far as it relates to the above described land assigned to it and subject to the said operating contract as to all of the terms, conditions, agreements and covenants therein contained.

IN WITNESS WHEREOF, the said corporations have caused this instrument to be executed in duplicate this 12th day of May, 1919, their respective seals being hereto attached by authority.

THE HOPEWELL OIL COMPANY.

By \_\_\_\_\_,  
President.

[Seal] Attest: \_\_\_\_\_,  
Secretary.

Witness:

\_\_\_\_\_  
\_\_\_\_\_.

THE MIDNIGHT OIL COMPANY.

By \_\_\_\_\_,  
President.

Attest: \_\_\_\_\_,  
Secretary.

\_\_\_\_\_  
\_\_\_\_\_. [25]

State of Colorado,  
City and County of Denver,—ss.

On this 12th day of May, A. D. 1919, before me appeared George C. Manly and B. E. Thompson to me personally known, who being by me duly sworn did say that they are, respectively, the

President and Secretary of The Hopewell Oil Company, a corporation; that the seal affixed to the above and foregoing instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said George C. Manly, as its President, and said B. E. Thompson, as its Secretary, acknowledge said instrument to be the free act and deed of said corporation.

Given under my hand and Notarial Seal this 12th day of May, 1919.

My commission expires May 26, 1921.

[Seal]

MARGARET SCHAAF,  
Notary Public.

State of Colorado,  
City and County of Denver,—ss.

On this 12th day of May, A. D. 1919, before me appeared —— and ——, to me personally known, who being by me duly sworn did depose and say that they are, respectively, the President and Secretary of The Midnight Oil Company, a corporation; that the seal affixed to the above and foregoing instrument is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said —— as its President, and said —— as its Secretary, acknowledged said instrument to be the free act and deed of said corporation.

Given under my hand and notarial seal this 12th day of [26] May, 1919.

My commission expires ———.

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Notary Public.

Due service and receipt of copy of the within Amended Answer is hereby acknowledged this 27th day of July, 1922.

DUDLEY D. SALES,  
Attorney for Plaintiff.

[Endorsed]: Filed July 27, 1922. Walter B. Mal-  
ing, Clerk. [27]

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(Title of Court and Cause.)

**(Demurrer to Amended Answer.)**

Now comes plaintiff and demurs to defendant's first amended answer herein upon the following grounds:

I.

That said answer does not state facts sufficient to constitute a defense to plaintiff's complaint herein.

II.

That defendant's first defense to plaintiff's complaint herein, to wit: the defense set up in paragraphs I-VI, inclusive, of said answer does not state facts sufficient to constitute a defense.

WHEREFORE plaintiff prays judgment against defendant as prayed for in its complaint herein.

DANA, BLOUNT & SILVERSTEIN,  
DUDLEY D. SALES,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 2, 1922. W. B. Mal-  
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[28]

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At a stated term, to wit, the July term, A. D. 1922,  
of the Southern Division of the United States  
District Court for the Northern District of  
California, Second Division, held at the court-  
room in the City and County of San Francisco,  
on Monday, the 18th day of September in the  
year of our Lord one thousand nine hundred  
and twenty-two. Present: The Honorable  
WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

**Minutes of Court—September 18, 1922—Order Sus-  
taining Demurrer to Amended Answer.**

Plaintiff's demurrer to amended answer came  
on to be heard and after arguments being submitted  
it was ordered that said demurrer be and is hereby  
sustained; to which ruling defendant excepted.  
[29]

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(Title of Court and Cause.)

Before: Hon. WM. C. VAN FLEET, U. S. District  
Judge.

**Oral Opinion.**

Monday, January 22, 1923.

The COURT. (Orally.)—In this case the plain-  
tiff sues for damages arising out of the breach of



a contract which provides that, in the event of its breach plaintiff may recover a liquidated amount by reason of the difficulty of ascertaining the exact amount of damages that would result from the breach. An answer was put in to which a demurrer was subsequently sustained and no amended answer having been filed a default has now been entered. This is a motion to direct the Clerk to enter judgment upon the default in the liquidated amount specified in the contract. The usual course pursued in these courts, where there is a question as to the amount of damages which the plaintiff is entitled to recover, is to call a jury for assessment of the damages and that course has been suggested here; but I am satisfied from the authorities that this course is not called for where, as here, the parties have stipulated for liquidated damages, and in case where by reason of the difficulty of estimating the loss arising a stipulation of that kind would be good under the State statute. Under the State law if parties stipulate for liquidated damages in an instance where the actual damages resulting is readily ascertainable it is established that the stipulated sum will be treated as in the nature of a penalty, the stipulation void and the parties will be relegated to their rights under the contract as if no such stipulation had been made. Here the subject of the contract is such that it can readily be seen that it would be practically impossible to ascertain with any degree of certainty the actual damage suffered by the breach and in such an instance they were entitled to stipulate for

its liquidation. In such a case the intervention of a jury is wholly [30] unnecessary. The order accordingly will be that the plaintiff may have the Clerk enter a judgment for the amount stipulated in the contract.

[Endorsed]: Filed Feb. 6. 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [31]

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At a stated term, to wit, the November term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday the 22d day of January in the year of our Lord one thousand nine hundred and twenty-three—Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Cause.)

**Minutes of Court—January 22, 1923—Order for Judgment.**

Plaintiff's motion for a judgment by default, heretofore submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said motion be granted and that judgment be entered in favor of plaintiff and against defendant in the sum of \$12,360.00 together with costs. [32]

(Title of Court and Cause.)

**Judgment on Default.**

In this cause the defendant, H. Allen Rispin, having failed to file his second amended answer to the complaint after the sustaining of plaintiff's demurrer to the amended answer to the complaint, within the time allowed by order of Court, and the default of said defendant having been duly entered, and the Court, upon motion of Dudley D. Sales, Esq., attorney for plaintiff, having ordered that judgment be entered herein in accordance with the prayer of the complaint:

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that The Midnight Oil Company, a corporation, plaintiff, do have and recover of and from H. Allen Rispin, defendant, the sum of Twelve Thousand Three Hundred Sixty and No/100 (\$12,360.00) Dollars, together with its costs herein expended taxed at \$26.27.

Judgment entered January 22, 1923.

WALTER B. MALING,

Clerk. [33]

(Title of Court and Cause.)

**Petition for Allowance of Writ of Error and Order  
of Allowance.**

To the Honorable the United States District Court  
for the Northern District of California, Southern  
Division:

The above-named defendant in the above-entitled and numbered cause, considering himself aggrieved by the judgment made and entered in said cause on the 22d day of January, 1923, hereby prays this Honorable Court to allow a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in his assignment of errors filed herewith, and prays that a transcript of the record, proceedings and papers upon which said judgment was made and entered, as aforesaid, duly authenticated, may be sent to said Circuit Court of Appeals, sitting at San Francisco, California.

The judgment above referred to, and which this defendant desires to have reviewed by writ of error, as aforesaid, adjudged that this defendant pay to plaintiff the sum of Twelve Thousand Three Hundred and Sixty Dollars (\$12,360.00), together with costs amounting to Twenty-six and Twenty-seven Hundredths Dollars (\$26.27).

And said defendant further prays that this Honorable Court make and enter an order allowing such writ of error and fixing the amount of the security to be required to perfect these proceedings



and to stay execution on said judgment, pending the determination of said proceedings in error.

A. L. WEIL,

FORREST A. COBB,

Attorneys for Defendant. [34]

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**Order Allowing Writ of Error and Fixing Amount of Bond.**

The foregoing petition for writ of error having been presented to the Court and by it duly considered, it is hereby ordered that the said petition be, and the same is hereby granted and allowed, and the bond on said proceedings in error to be given on behalf of plaintiff in error is hereby fixed at Fifteen Thousand (\$15,000) Dollars, to be conditioned according to law.

Dated: February 9th, 1923.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Feb. 9, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [35]

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(Title of Court and Cause.)

**Assignment of Errors.**

H. Allen Rispin, defendant and plaintiff in error in the above-entitled cause, files with his petition for writ of error herein, the following assignments of error:

The Honorable United States District Court erred:

1. In overruling defendant's demurrer to plaintiff's complaint and in holding that said complaint states facts sufficient to constitute a cause of action against defendant.

2. In sustaining plaintiff's demurrer to defendant's amended answer and in holding that said amended answer does not state facts sufficient to constitute a defense to said action.

3. In directing judgment to be entered in favor of plaintiff and against defendant in accordance with the prayer of plaintiff's complaint.

WHEREFORE defendant prays the reversal of the judgment herein.

A. L. WEIL,

FORREST A. COBB,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Filed Feb. 14, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[36]

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**Bond on Writ of Error.**

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND.

Home Office:

Pacific Coast Dept. Office,

Baltimore, Md.

San Francisco, Cal.

(Title of Court and Cause.)

KNOW ALL MEN BY THESE PRESENTS:  
That WHEREAS, H. Allen Rispin, the above-

named defendant and plaintiff in error, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause, heretofore made and entered herein on the 22d day of January, 1923.

NOW, THEREFORE, we, H. Allen Rispin, the above-named defendant and plaintiff in error herein, as principal, and Fidelity & Deposit Company of Maryland, a corporation duly authorized and allowed to become and act as surety upon bonds or undertakings, under and by virtue of an Act of Congress, as sole surety, are held and firmly bound unto the Midnight Oil Company, a corporation, the above-named plaintiff, and defendant in error herein, in the sum of Fifteen Thousand (15,000) dollars to be paid to the said The Midnight Oil Company, a corporation, its successors or assigns, for which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, firmly by these presents.

SEALED with our seals and dated the 12th day of March, 1923.

THE CONDITION of this obligation is such that if the said H. Allen Rispin, the above-named defendant, and plaintiff in error, herein, shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

The undersigned surety does hereby expressly covenant and agree that in case of a breach of said,

or any condition of this [37] bond, this Court may, upon notice to it of not less than ten days, proceed summarily in the above-entitled action, to ascertain the amount which it is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

IN WITNESS WHEREOF the undersigned have caused these presents to be duly executed and the said surety has caused its corporate seal to be affixed hereto by its duly authorized representatives.

H. ALLEN RISPIN.

FIDELITY & DEPOSIT COMPANY OF  
MARYLAND. (Seal)

By JOHN F. ROBERTSON,  
Attorney in Fact.

Attest: F. M. PALMER,  
Agent.

Approved: March 13, 1923.

R. S. BEAN,  
Judge.

[Endorsed]: Filed Mar. 13, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[38]



(Title of Court and Cause.)

**Praeipice for Transcript by Plaintiff in Error.**

To Walter B. Maling, Clerk of the United States  
District Court, Northern District of California,  
Southern Division:

Please prepare and duly certify, for the proceedings in error of defendant, H. Allen Rispin, to the United States Circuit Court of Appeals for the Ninth Circuit, against the judgment in the above-entitled and numbered suit in favor of the plaintiff and against said defendant, made and entered on the 22d day of January, 1923, a transcript, incorporating the following portions of the record herein:

RECORD ON APPEAL.

Complaint.

Demurrer to complaint.

Order overruling demurrer to complaint.

Amended answer.

Demurrer to amended answer.

Order sustaining demurrer to amended answer.

Order for judgment.

Judgment.

Petition for allowance of writ of error and order  
of allowance.

Assignment of errors.

Writ of error.

Citation on writ of error.

Bond on proceedings in error.

This praeipice.

Dated: February 8th, 1923.

A. L. WEIL,

FORREST A. COBB,

Attorneys for Defendant and Plaintiff in Error.

[Endorsed]: Filed Feb. 23, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[39]

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(Title of Court and Cause.)

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing thirty-nine (39) pages, numbered from 1 to 39, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$16.45; that said amount was paid by the defendant and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 14th day of March, A. D. 1923.

[Seal]                      WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California. [40]

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### **Writ of Error.**

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division, GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between H. ALLEN RISPIN, plaintiff in error, and THE MIDNIGHT OIL COMPANY (a corporation), defendant in error, a manifest error hath happened, to the great damage of the said H. ALLEN RISPIN, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the

same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 14th day of February, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal]                      WALTER B. MALING,  
Clerk of the United States District Court, Northern  
District of California.

By J. A. Schaertzer,  
Deputy Clerk.

Allowed by

R. S. BEAN,  
Dist. Judge. [41]

Receipt of a copy of the within writ of error is hereby admitted this 23d day of February, 1923.

DUDLEY D. SALES,  
Attorney for Plaintiff and Defendant in Error.

### **Return to Writ of Error.**

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things



touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]                      WALTER B. MALING,  
Clerk U. S. District Court for the Northern Dis-  
trict of California.

[Endorsed]: No. 16,718. United States District Court for the Northern District of California, Southern Division. H. Allen Rispin, Plaintiff in Error, vs. The Midnight Oil Company, Defendant in Error. Writ of Error. Filed Feb. 26, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

### Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to THE MID-NIGHT OIL COMPANY (a Corporation),  
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court

for the Northern District of California, Southern Division, wherein H. Allen Rispin is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable R. S. BEAN, United States District Judge for the Northern District of California, this 23d day of February, A. D. 1923.

R. S. BEAN,

United States Dist. Judge. [42]

Receipt of a copy of the within Citation on writ of error is hereby admitted this 23d day of February, 1923.

DUDLEY D. SALES,

Attorney for Plaintiff and Defendant in Error.

[Endorsed]: No. 16,718. United States District Court for the Northern District of California, Southern Division. H. Allen Rispin, Plaintiff in Error, vs. The Midnight Oil Company (a Corporation), Defendant in Error. Citation on Writ of Error. Filed Feb. 26, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

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[Endorsed]: No. 3994. United States Circuit Court of Appeals for the Ninth Circuit. H. Allen Rispin, Plaintiff in Error, vs. The Midnight Oil Company, a Corporation, Defendant in Error.

Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed March 14, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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H. ALLEN RISPIN,

*Plaintiff in Error,*

VS.

THE MIDNIGHT OIL COMPANY

(a corporation),

*Defendant in Error.*

**BRIEF FOR PLAINTIFF IN ERROR.**

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A. L. WEIL,

FORREST A. COBB,

*Attorneys for Plaintiff in Error.*

HARRIS F. SHAW,

*Of Counsel.*

FILED

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No. 3994

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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H. ALLEN RISPIN,

*Plaintiff in Error,*

VS.

THE MIDNIGHT OIL COMPANY

(a corporation),

*Defendant in Error.*

---

## BRIEF FOR PLAINTIFF IN ERROR.

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This is an action by The Midnight Oil Company against H. Allen Rispin upon a contract of guaranty to recover the sum of \$10,000.00 as liquidated damages for an alleged breach of the principal obligation. The principal obligation in substance provides that the Associated Oil Company will, barring unavoidable delays, commence and drill a well upon certain land belonging to The Midnight Oil Company by a specified time and in a particular manner and test out the known productive oil sands of the

Lance Creek field in the State of Wyoming (Tr. p. 21). The guaranty provides that upon the failure of the Associated Oil Company so to commence and drill the well, Rispin, upon notice, will pay The Midnight Oil Company \$10,000.00 as liquidated damages for any such breach of the principal obligation (Tr. p. 4).

The complaint alleges the failure of the Associated Oil Company to drill the well, a notice to the defendant of such failure and a demand for the payment of the above named sum as liquidated damages, and that it would be impracticable and extremely difficult to fix actual damages suffered by plaintiff because of the failure to drill such well.

There is no allegation that the Associated Oil Company was not prevented by unavoidable delays, nor any allegation that the plaintiff has suffered any damage by reason of said alleged failure.

The general demurrer interposed by defendant was overruled and thereafter he filed his amended answer (Tr. p. 8).

The amended answer alleges in substance that the plaintiff herein succeeded to all the right, title and interest of the Hopewell Oil Company as lessor under a lease and operating contract with the Associated Oil Company; that under this operating lease, the Hopewell Oil Company agreed to immediately deliver possession of the land described in plaintiff's complaint to the Associated Oil Company for operation under said lease; that by the terms of the

assignment of said operating lease from the Hope-well Oil Company to the plaintiff, the latter agreed to perform all the terms, conditions, agreements and covenants of the said operating lease so far as it related to said land referred to in plaintiff's complaint (Tr. p. 8, pp. 26-28).

The amended answer then alleges that the Associated Oil Company was at all times ready, able and willing to commence the drilling and completion of the well on said premises in the manner provided in the principal obligation on or before the 15th day of June, 1919, but that plaintiff herein was unable and failed, neglected and refused to deliver possession of the said premises to said Associated Oil Company on or before said date; that the Associated Oil Company at said time attempted to secure possession of said premises but was prevented from so doing by threats of physical violence to its servants and by forcible opposition by third parties claiming the premises adversely to plaintiff; that except for plaintiff's failure to deliver possession of the premises, the Associated Oil Company would have drilled and completed a well on the premises commencing on or before June 15, 1919, in accordance with the provisions of the principal obligation, and would have thereafter prosecuted the drilling of the well and tested out the known productive oil sands of the Lance Creek field (Tr. pp. 9-10).

The allegation then follows that the Associated Oil Company was barred by unavoidable delays on



its part from drilling or commencing to drill a well on said premises on or before the 15th of June, 1919 (Tr. p. 10).

It is further alleged by defendant that during the time the Associated Oil Company was excluded from said premises, other wells were drilled on the geologic structure underlying said premises and that such wells have tested out the known productive oil sands of the Lance Creek field and have demonstrated that oil in commercial quantities does not exist under said premises. It is then alleged that plaintiff has sustained no damage of any kind by reason of anything set forth in its complaint. The amended answer specifically denies that it would be impracticable or extremely difficult to fix actual damages which may have been suffered by plaintiff and alleges that at all times it would be and is an extremely simple and easy matter exactly to compute any damage which may have occurred or did occur to plaintiff (Tr. pp. 10-11).

The general demurrer of plaintiff to defendant's amended answer was sustained (Tr. p. 31). Defendant declining further to amend his answer, the Court below directed that judgment be entered for plaintiff as prayed (Tr. pp. 31-32).

Plaintiff in error makes the following assignments of error (Tr. pp. 36, 37):

The Court erred:

1. *In overruling the defendant's demurrer to plaintiff's complaint and in holding that said*

*complaint states facts sufficient to constitute a cause of action against defendant.*

2. *In sustaining plaintiff's demurrer to defendant's amended answer and in holding that said amended answer does not state facts sufficient to constitute a defense to said action.*

3. *In directing judgment to be entered in favor of plaintiff and against defendant in accordance with the prayer of plaintiff's complaint.*

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## I.

THE COURT ERRED IN SUSTAINING THE PLAINTIFF'S DEMURRER TO DEFENDANT'S AMENDED ANSWER AND IN HOLDING THAT THE AMENDED ANSWER DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A DEFENSE TO SAID ACTION.

Because we believe the most obvious error on the part of the Court below consisted in sustaining the demurrer of plaintiff to the defendant's amended answer, we will consider that question first:

We consider that in this ruling the Court was clearly in error because:

1. The demurrer admits that performance by the principal obligor (Associated Oil Company) was prevented by the default of the obligee (The Midnight Oil Company) and hence the defendant Rispin, as guarantor, is discharged.

2. The sum to be paid is for a penalty in which case plaintiff cannot recover without allegation and proof of actual damage, and the demurrer admits defendant's allegation that plaintiff suffered no damage whatsoever.

3. It being admitted that no damage whatever has been sustained by reason of the alleged default of the principal obligor, plaintiff could not recover even liquidated damages.

The contract sued upon is clearly a contract of guaranty. It meets every test.

Defendant did not agree to drill a well for plaintiff, but merely guaranteed that, under certain conditions, and barring unavoidable delays, that the Associated Oil Company would do so. The Associated Oil Company was therefore the principal obligor and the defendant herein the guarantor. If, therefore, the Associated Oil Company was for any reason discharged of its obligation to perform, the defendant herein, as guarantor, was likewise relieved of liability.

By the terms of the principal obligation, the Associated Oil Company was obligated to drill a well *only if not barred* by unavoidable delays. It is not alleged in the complaint that the Associated Oil Company *was not barred* by unavoidable delays. On the other hand, it is expressly admitted by the demurrer to the amended answer, not only that the Associated Oil Company *was barred by unavoidable*

*delays*, but that that Company was ready, able and willing to commence and drill such well on said premises as it had agreed and that the plaintiff herein itself prevented performance by being unable and having failed, neglected and refused *to deliver possession of the premises*; the demurrer likewise admits defendant's allegation that but for plaintiff's failure so to deliver possession of the premises, the Associated Oil Company would have performed on its part,

1. Plaintiff failed to deliver possession of the premises, thus committed the first breach and can not insist upon performance.

Let us now examine the rights, duties and obligations of the plaintiff herein with reference to the drilling of such well.

By the contract annexed to defendant's amended answer (Tr. p. 19), the Hopewell Oil Company and the Associated Oil Company agreed that the Associated Oil Company should drill a well for oil and gas on certain lands, including the land mentioned in plaintiff's complaint herein. Here is the first provision of said contract:

"1. The said party of the first part (the Hopewell Oil Company) shall immediately deliver possession of said lands to the party of the second part (Associated Oil Company) for operation under the terms of said lease and under the terms of this agreement."

The lease referred to is the lease from the Western States Oil & Land Company to the Hopewell Oil Company, found in the transcript (p. 12).



The Hopewell Oil Company assigned (see Tr. p. 26) to the plaintiff herein all of its right, title and interest in the lease from the Western States Oil & Land Company and the operating agreement with the Associated Oil Company, so far as they relate to the land mentioned in the complaint herein. The concluding part of this assignment provides:

“TO HAVE AND TO HOLD by the said The Midnight Oil Company, its successors and assigns, subject, however, to all the terms, conditions, agreements, covenants and royalties expressed in said lease, which said terms, conditions, agreements, covenants and royalties, The Midnight Oil Company agrees to keep, perform and pay so far as it relates to the above described land assigned to it and subject to the said operating contract as to all of the terms, conditions, agreements and covenants therein contained.”

The amended answer alleges that this assignment to the plaintiff is the same assignment referred to in the instrument sued upon herein and set out in Paragraph IV of plaintiff's complaint (Tr. p. 9).

We therefore have this situation. The plaintiff herein expressly covenanted to put the Associated Oil Company into possession of the premises. The amended answer alleges that plaintiff failed, neglected and refused to put the Associated Oil Company into possession and that but for such failure, the Associated Oil Company would have performed on its part. Obviously, the Associated Oil Company could not drill a well upon this land without having possession thereof, and we therefore have the re-

markable situation of an obligee suing the guarantor for the failure of the obligor to perform, which failure was in turn occasioned by the default of the obligee.

Under these facts, and under well settled authorities, this failure on the part of the plaintiff discharged the Associated Oil Company of all liability under the operating agreement, and the defendant herein being but a secondary obligor, was likewise discharged.

“Where the lease contains express covenants to put the lessee in possession, a subsequent trespass by a third person before the lessee has entered \* \* \* will constitute a breach of the contract for which the lessor is liable \* \* \* If possession is withheld by the lessor \* \* \* the lessee may at his option repudiate the contract or bring an action against the lessor for a breach of his agreement.”

24 Cyc., 1051;

*Brandt v. Phillippi*, 82 Cal. 640;

*Dengler v. Michellsen*, 76 Cal. 125;

*Rice v. Whitmore*, 74 Cal. 619;

*Hay v. Cumberland*, 25 Barb. 594;

*King v. Reynolds*, 67 Ala. 229; 42 Am. Rep. 107.

In *Brandt v. Phillippi*, supra, it is said:

“It is the duty of the lessor to put his lessee in possession and until he does so, he cannot recover rent.”

In *Dengler v. Michellsen*, supra, an action for rent, it appeared that the landlord could not put the

defendants in possession at the beginning of the lease and the defendants thereafter refused to have anything to do with the premises. In affirming judgment for defendants, the Court said:

“The failure of plaintiffs to put defendants or their assignor in possession of the leased premises justified the defendants in abandoning the premises.”

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That the amended answer in alleging that plaintiff prevented performance by the Associated Oil Company, stated a complete defense to this action, is likewise established by the case of

*U. S. v. United Engineering Co.*, 234 U. S. 236; 58 L. Ed. 1294,

and the authorities there cited.

In that case the company sued for some \$6,000.00 deducted by the government as liquidated damages for 240 days delay under a contract for the construction of a drydock. It appeared that the government had delayed performance by the company and the Court said in giving judgment for the plaintiff:

“We think the better rule is that when the contractor has agreed to do a piece of work within a given time and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day’s delay, in order to enforce such payment, the other party must not prevent the performance of the contract within the stipulated time  
\* \* \* Certainly the other party ought not to be

permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated time. To do this would permit it to recover damages for delay caused by its own conduct. \* \* \* If a man agrees to do something by a particular time, or in default, to pay a sum of money as liquidated damages, the other party must not do anything to prevent him from doing the thing contracted for within the specified time."

In the case of *National Surety Co. v. Long*, 125 Fed. 887, the Court said:

"The plaintiff failed to keep his covenants before the Surety Company had in any way failed to comply with those which it had made. On this account, he cannot enforce the fulfillment of the covenants of the defendant. He who commits the first substantial breach of a contract, can not maintain an action against the other contracting party for a subsequent failure on his part to perform."

See, also,

*Loudenbach v. Tennessee Phosphate Co.*, 121 Fed. 298.

It thus appearing that the Associated Oil Company was clearly released, it necessarily follows that the defendant Rispin, as guarantor, was likewise released.

"If there is no obligation on the principal, there is none of the guarantor."

12 *Ruling Case Law*, 1053;

*Kilbride v. Moss*, 113 Cal. 432.



2. The sum to be paid is for a penalty and plaintiff cannot recover without allegation and proof of actual damage.

Plaintiff's complaint does not allege that plaintiff has suffered any damage, and defendant's amended answer expressly alleges that plaintiff did not.

It therefore becomes necessary to classify the guaranty as providing for liquidated damages or for a penalty. If the guaranty is to be construed as providing for a penalty, it is of course *elementary* that actual damage must be alleged and proved, and that recovery is limited to compensation therefor.

The instrument itself purports to provide for liquidated damages. This, however, is not determinative.

*In re Sherwoods*, 210 Fed. 760;  
*Bethlehem Steel Co.*, 205 U. S. 105.

Neither is it determinative that the instrument recites that actual damages would be difficult to ascertain.

*Pacific Factor Company v. Adler*, 90 Cal. 110;  
*Dyer Bros. v. Central Iron Works*, 182 Cal. 588.

The question is a proper one for this Court to inquire into under the proper rules of law applicable to the construction of such contracts. Not only that, but the Court should incline to construe the provision rather as for a penalty than for liquidated damages, because by so doing, substantial jus-

tice can be more nearly accomplished.

17 *Corp. Juris*, 938, and cases cited;

*Johnson v. Southwestern Surety Co.*, 206 Fed. 486;

*Ill. Surety Co. v. U. S.*, 229 Fed. 527.

The distinction between a penalty and a provision for liquidated damages is as follows:

“A penalty is in effect a security for performance while a provision for liquidated damages is for a sum to be paid in lieu of performance.”

17 *Corpus Juris*, 933.

Obviously, the guaranty executed by this defendant gave the Associated Oil Company no choice of anything in lieu of performance. Notwithstanding the guaranty executed by defendant, the Associated Oil Company would still default in performance at its peril. As a provision for liquidated damages, this defendant's contract of guaranty very obviously fails to meet the test of something in lieu of performance, because, in the event of default by the principal obligor, defendant's liability, instead of being in lieu of performance, would be in addition to it.

Another test frequently applied to provisions of this character, to ascertain whether they are for liquidated damages or for a penalty, is the test of whether the provision is collateral to another agreement. It has been frequently held that where the agreement is made for the attainment of another

object or purpose, to which the stipulated sum is entirely collateral, such stipulated sum will be treated as a penalty.

*O'Keefe v. Dyer*, 20 Mont. 477; 152 Pac. 196;

*Potomac Power Co. v. Burchell*, 109 Va. 676;  
64 S. E. 982;

*Gougar v. Buffalo Specialty Co.*, (Colo.) 141  
Pacific 515;

*Johnson v. Southwestern Surety Co.*, 206 Fed.  
486;

17 *Corpus Juris*, 946.

There would seem to be no doubt but that the contract of guaranty executed by this defendant was entirely collateral and subordinate to the main object desired by the obligee, namely, the object of getting its well drilled at the time and in the manner specified. The obligation of this defendant to pay the stipulated sum of ten thousand dollars was not only collateral to this main purpose, but was actually dependent upon it. The plaintiff would hardly suggest, we suppose, that it had entered into a wagering contract, or made a bet with the defendant as to whether the Associated Oil Company would perform its contract or not, and unless plaintiff takes this precise position, defendant's contract of guaranty exactly means a compliance with this second test of what constitutes a penalty.

There is still another test which is frequently applied to contracts for the purpose of determining whether they applied for stipulated damages or for

penalty. It was stated in the case of

*People v. Central Pacific R. R. Co.*, 76 Cal. 37,  
as follows:

“If a gross sum is stipulated to be paid for any failure to fulfill an agreement consisting of several parts, and requiring several things to be done or omitted, it is a penalty. The statement is true \* \* \* even where the actual damages are uncertain, if it appears that the damages resulting from one of the breaches may be great and from another small, since the inequality is logically certain.”

The same rule was stated in

*Wilkins v. Colley*, 164 Pa. 35; 30 Atl. 286,  
as follows:

“Where there are a number of covenants and the sum named would be payable for a breach of any one of them, even the least, it is a penalty.”

and the same rule was expressed in

*Watts, Executor v. Sheppard*, 2 Alabama 425,  
as follows:

“Where the articles covenant for the performance of several things and stipulate for the payment of a sum in gross, in the event of a breach, the sum expressed must be considered as a penalty. *And if the parties would stipulate the damage, in such a case, they would express the sum to be paid upon each distinct breach.*”

See, also,

*Escondido Oil Co. v. Glaser*, 144 Cal. 495,  
where the sum to be paid by way of liquidated dam-



ages was “for the breach of the contract *or any part thereof*”, and

*Tudor v. Beath* (Ind.), 131 N. E. 848,  
in which the authorities are collected and reviewed.  
See, also, the rule as discussed by the learned United  
States Circuit Court of Appeals for the Second Cir-  
cuit in the case of

*Ill. Surety Co. v. U. S.*, 229 Fed. 527.

The rule was not applicable to the facts of that particular case, because the bond under discussion ran in favor of the United States government, but the Court stated as follows:

“If this bond had been given to an individual instead of to the government, it might be important that it contained no less than sixteen conditions of varying importance; for courts have held that where an agreement contains several distinct and independent covenants, upon which there may be several breaches, and one sum is stated to be paid upon the breach of performance, that sum is to be regarded as a penalty and not liquidated damages (*Lampman vs. Cochran*, 16 N. Y. 275; *Hoagland vs. Segur*, 38 N. Y. Law 230; *Chase v. Allen*, 13 Gray (79 Mass.) 42; *Keck v. Bieber*, 148 Pa. 645; 24 Atl. 170; 33 Am. St. Rep. 846. That doctrine was applied by the Supreme Court in *Bignall v. Gould*, 119 U. S. 495; 7 Supreme Court 295; 30 Lawyers Ed. 491.”

Turning now to the agreement executed by this defendant, for the purpose of ascertaining its character by this third test, let us see exactly what defendant guaranteed in the sum of ten thousand dollars that the Associated Oil Company would do:

(a) That the Associated Oil Company would commence to drill on or before June 15, 1919; (b) That they would use a rig capable of reaching a depth of 4000 feet; (c) That they would prosecute the well continuously thereafter, barring unavoidable delays; (d) That they would complete the well barring unavoidable delays; (e) That they would reach the depth of the known productive oil sands.

Every one of the above acts agreed to be performed by the Associated Oil Company were to be performed in the manner specified and indeed a careful perusal of the documents in question will indicate that there were numerous other acts also to be done on the part of the Associated Oil Company for the performance of which defendant was bound in this sum.

But, lest there should be any question but what defendant was bound in the full amount of the penal sum specified for the performance of *each* of these acts, we refer once more to the language of the guaranty herein sued upon, which is as follows:

“Should the Associated Oil Company or its assigns for any reason fail to drill and complete said well *in manner and form as above specified*, then and in that event, and because the damage occasioned thereby to the Midnight Oil Company would be difficult if not impossible to ascertain \* \* \* the undersigned, H. A. Rispin, agrees to pay to the said Midnight Oil Company the sum of ten thousand dollars \* \* .”

In other words, under the language of the instrument herein sued upon, this defendant would be lia-

ble to plaintiff in the identical amount if the Associated Oil Company was one day or one month late in commencing to drill, as if the Associated Oil Company had failed to drill at all. This defendant would be liable for ten thousand dollars if the Associated Oil Company had performed its contract with a rig capable only of reaching a depth of 3000 feet, as if the Associated Oil Company had failed completely to do anything which it was obligated to do. Under the language of this agreement, defendant was liable equally for trivial defaults which would result in no damage whatsoever to plaintiff as well as for defaults which would deprive plaintiff of the entire fruits of its contract. Under all of the authorities, in such a case as this, and for the purpose of accomplishing substantial justice, the provision should be construed as for a penalty and not for liquidated damages.

The provision herein sued upon, therefore, fails to meet the three most important tests of the provision for liquidated damages, and meets exactly the corresponding tests of what constitutes a penalty. In such case, plaintiff in error submits that the general rule of law applicable to provisions for a penalty applies to this case, and that in the absence of allegations and proof of damage, no recovery can be had.

3. Provision even for liquidated damages will not be enforced where no damages whatever have been sustained.

As we have heretofore seen the complaint does not allege any damage suffered by plaintiff. The amend-

ed answer alleges that plaintiff has sustained no damage. If such were the fact and that issue of fact is directly presented by the amended answer, and, of course, is admitted by plaintiff's general demurrer, it is immaterial whether the provision is for liquidated damages or for a penalty. In neither case will a provision be enforced if no damage has been sustained.

This question was considered and squarely decided by this Honorable Court in

*N. W. Fixture Co. v. Kilbourne*, 128 Fed. 256.

This Court was there considering an agreement containing the following provision:

“It is agreed that in the event either party hereto fails to keep his agreement, the party thus in default shall pay to the other party the sum of \$10,000.00 as liquidated damages for the breach thereof.”

The appellant in that case filed a claim for \$10,000.00 against the bankrupt's estate claiming the sum was due as liquidated damages provided in the agreement. The Court below rejected the claim and this Court, in affirming judgment, said:

“It is clear that no damages were recoverable by the appellant for the breach—if breach there were—of the contract. Conceding the rule to be that, in order to recover a sum as liquidated damages, it is unnecessary to prove actual damage, it is also true that *no provision in a contract for the payment of a fixed sum as damages, whether stipulated for as a penalty or as liquidated damages, will be enforced in a case*



*where the Court can see that no damages have been sustained.* It is the general rule that where the sum in the contract to be paid on the breach thereof is evidently wholly disproportionate to the damages actually sustained, or where it is shown that no actual damage has been sustained by the breach, the courts will deem the parties to have intended to stipulate for a mere penalty to secure performance." (Italics supplied.)

Citing:

19 *Am. & Eng. Enc. Law* (Sec. Ed.) 410;

*Gay v. Camp*, 65 Fed. 794;

*Wilcus v. King*, 87 Ill. 107.

The above portion of this Court's opinion was substantially quoted and followed in the case of

*The Columbia*, 197 Fed. 661.

Regardless, therefore, of whether the provision is a penalty or for liquidated damages, the issue of fact being directly raised that no damages whatever have been sustained by the plaintiff, the Court below committed error in disregarding this issue by sustaining the demurrer to the amended answer and holding that it does not state facts sufficient to constitute a defense to the action.

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## II.

### THE COURT ERRED IN OVERRULING THE DEMURRER TO THE COMPLAINT.

As we have pointed out heretofore, the complaint nowhere alleges that the Associated Oil Company

was not *prevented by unavoidable delays* in commencing to drill and thereafter to complete the well provided for in the contract. As we have heretofore seen by the very terms of the contract sued upon, that company was NOT obligated to commence the drilling and complete said well *if barred by unavoidable delays*. The covenant on the part of the defendant is specific in its guaranty that the Associated Oil Company will drill such well, *barring unavoidable delays*. If there was no obligation on the part of the Associated Oil Company, the defendant could, of course, not have guaranteed it. The complaint should, therefore, allege facts showing that the Associated Oil Company was obligated to perform on its part.

“A complaint in an action on a guaranty must generally set out the terms of a guaranty and the principal obligation.”

12 *Ruling Case Law*, 1095.

The complaint in this case does not measure up to the requirements of this rule and is deficient in all of the particulars which we have enumerated hereinabove.

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### III.

**THE COURT ERRED IN DIRECTING JUDGMENT TO BE ENTERED IN FAVOR OF PLAINTIFF AND AGAINST DEFENDANT IN ACCORDANCE WITH THE PRAYER OF PLAINTIFF'S COMPLAINT.**

The Court below assumed as a matter of law that this was a proper case for liquidated damages and

proceeded to give judgment without hearing any evidence either as to whether it was impracticable or extremely difficult to fix actual damages, or whether plaintiff had suffered no damage as alleged by defendant.

The Court below in its opinion said (Tr. p. 32):

“Here the subject of the contract is such that it can readily be seen that it would be practically impossible to ascertain with any degree of certainty the actual damage suffered by the breach and in such an instance they were entitled to stipulate for its liquidation. In such a case the intervention of a jury is wholly unnecessary.”

We believe and we now urge that this action on the part of the Court was error for the following reasons:

(1) It is alleged in the complaint that it would be, was and is impracticable and extremely difficult to fix the actual damages suffered by plaintiff.

This is a necessary allegation to plaintiff's cause of action and if denied by defendant, of course, requires proof. The allegation, furthermore, is specifically denied, and thus is presented a question of fact that the Court below obviously disregarded as shown in the above portion of its opinion.

In *Dyer v. Central Iron Works*, 182 Cal. 588, the Court directly decided that the question whether it would be impracticable or extremely difficult to fix actual damages *is a question of fact and requires both pleading and proof.*

The Court obviously considered that fact to be properly pleaded, but entirely dispensed with the necessity of hearing proof. In this the Court erred, because an issue of fact is disregarded and left undecided.

(2) It is clear under the authorities heretofore cited that the sum to be paid under the contract is a penalty and not as for liquidated damages. Before the Court could enter a proper judgment, there would therefore have to be evidence of actual damage, or at least an allegation of actual damage.

*Ill. Surety Co. v. U. S.*, 229 Fed. 527; 8 Cal. Juris. 844.

(3) Even if it be assumed the provision is for liquidated damages, under the authorities heretofore cited, particularly *N. W. Fixture Co. v. Kilbourne*, 128 Fed. 256, if no damage whatever has been sustained by plaintiff, the Court below was without authority to give judgment for plaintiff. The defendant particularly alleges that no damage whatever has been sustained by plaintiff. The demurrer to the answer, of course, expressly admits this allegation to be true. With the record in this condition, how could the Court below properly proceed to enter judgment for plaintiff for \$10,000.00?

For these reasons, the Court erred in entering judgment as prayed for without first disposing of the issues, first, as to whether it was a proper case for liquidated damages and, second, whether any damage whatsoever had been sustained by plaintiff.



**CONCLUSION.**

To summarize our contentions in this case, the judgment of the trial Court should be reversed because:

1. (a) The complaint does not sufficiently allege an obligation on the part of the principal obligor which defendant could have guaranteed;

(b) It appears on the face of the complaint itself that the sum to be paid is for a penalty and requires both allegation and proof of actual damage, both of which are lacking.

2. (a) The plaintiff itself, under the allegations of the amended answer, prevented performance by the principal obligor and thereby discharged both the principal and secondary obligors;

(b) The principal obligor was excused from performance under its agreement if barred by unavoidable delays; the contract sued upon only guarantees performance of the principal obligor if not barred by unavoidable delays; the defendant alleges that the principal obligor was barred by unavoidable delays;

(c) The defendant alleges that no damage whatever has been sustained by the plaintiff;

3. The defendant denies that it would be impracticable or extremely difficult to fix actual damages and alleges that damage would be easy of ascertainment.

All of the above issues of fact were disregarded and left undecided by the trial Court in entering judgment.

For these reasons, the judgment of the trial Court should be reversed.

Respectfully submitted,

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HARRIS F. SHAW,

*Of Counsel.*

Dated, San Francisco,

May 11, 1923.



No. 3994

IN THE  
**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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H. ALLEN RISPIN,

*Plaintiff in Error,*

vs.

THE MIDNIGHT OIL COMPANY

(a corporation),

*Defendant in Error.*

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**BRIEF FOR DEFENDANT IN ERROR.**

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DANA, BLOUNT & SILVERSTEIN,

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FILED

JUL 2 - 1903

F. C. MONROTON,





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For the Ninth Circuit

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*Defendant in Error.*

## BRIEF FOR DEFENDANT IN ERROR.

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As viewed by defendant in error the principal point of law presented in the opening brief of plaintiff in error is whether material issues were made by those allegations in the answer which are in substance, as follows:

FIRST. That the contract in suit was not such that it was impracticable or extremely difficult to fix the actual damage occasioned by a breach on the part of plaintiff in error.

SECOND. That defendant in error suffered no actual damage by the failure to drill the well as

agreed, as the property in question was barren of oil.

Defendant in error contends that the allegation in the complaint that it was impracticable and extremely difficult to fix the damage is mere surplusage, as this fact otherwise appears from the complaint. The complaint sets out the contract in full. It is an ordinary oil-well drilling contract providing for liquidated damages in case of breach. The courts are almost unanimous in holding that such contracts show upon their face that it is impracticable and extremely difficult to fix the actual damage.

In the case of *McComber v. Kellberman*, 162 Cal. 747, the action was for a breach of an oil-well drilling contract providing for certain payments for failure to drill the well within the time agreed. Defendant contended that plaintiff could not recover liquidated damages, because,

“It was neither alleged or proven that the nature of the case is such that it would be extremely difficult or impracticable to fix the damages.”

On this point the court said:

“But if it were considered as liquidated damages the complaint and proof are sufficient to support the judgment. The nature of the case and the extreme difficulty of fixing damages arising from a breach of such a contract are fully shown by the lease itself.”

This point was directly decided in *Escondido Oil Company v. Glasier*, 144 Cal. 500, in which case a general demurrer was sustained to the complaint which was based upon an oil-well drilling contract providing for liquidated damages in case of breach. The complaint merely set forth the substance of the contract between the parties, there being no allegation as to the difficulty of fixing actual damages. The court said:

“However, as the case may be hereafter tried on its merits it is proper to say that in our opinion the agreement for liquidated damages should be upheld. The complaint sufficiently states the character and subject matter of the contract—‘the nature of the case’, to use the language of Section 1671 to show that upon its breach ‘it would be impracticable or extremely difficult to fix the actual damages’. Fixing the amount of damages sustained in contracts for digging oil wells very similar to the one here involved was upheld in *Gibson v. Oliver*, 158 Pa. St. 277 and the cases there cited and it would seem that damages for breaches of contracts touching future interest in oil-wells of unknown value are of such *remote and speculative character* as to bring them peculiarly within the rule that the parties should have the right to fix them by mutual agreement. In the case at bar the right of plaintiff under the contract with the Insurance Company to test the land and to acquire a valuable interest therein, if the test proved successful, was limited in time and that right might be lost by failure of defendant to comply with his contract; and it was quite apparent that in such event it would be entirely impracticable to show



plaintiff's loss or what otherwise would have been his gain."

This court cited the *Escondido Oil Company* case supra with approval in the case of *Blodgett v. Columbia Live Stock Company*, 164 Fed. 305, Judge Ross writing the opinion. In the Blodgett case an oil-well drilling contract providing for liquidated damages was being considered. The complaint set forth the contract and alleged that plaintiff had been damaged in the amount agreed upon as liquidated damages. The trial court gave judgment for the amount specified in the contract as liquidated damages, although no damages had been proved and although there was no allegation in the complaint that it was impracticable or extremely difficult to fix the amount of actual damage. A portion of the opinion of Judge Ross is as follows:

"We think the judgment right. In the very nature of the case the damage which would result to the lessor by a breach of the lease by the lessee would *necessarily be indefinite, uncertain and speculative*. It was therefore eminently proper that the parties should fix such damages by mutual agreement."

Plaintiff in error cites the case of *Dyer v. Central Iron Works*, 182 Cal. 588, as authority for his contention. In said case on page 953 the court said:

"A provision in a contract which fixes the amount of the damage in advance of a breach is void unless the party seeking to recover the sum agreed upon shows by pleading and proof

that the provision is within the single exception to the general rule. (Long Beach City School District v. Dodge, 135 Cal. 401. Los Angeles Association v. Pacific Surety Company, 124 Cal. App. 95.) The complaint in the case at bar after enumerating the circumstances wherein the plaintiff sustained loss occasioned by defendant's breach alleges: 'That at all times it was and is impracticable and extremely difficult to fix the amount of damage for loss to plaintiff, or to prove the same.' This allegation which, of course is admitted by the demurrer, renders the complaint sufficient for the purpose of bringing the case within the exception provided by Section 1671 of the Civil Code."

Note that the court does not hold that this complaint would not have been sufficient if said allegation did not appear therein. In fact the court very properly might have held that such allegation was unnecessary as *the nature of the case* appeared from the contract set forth in the complaint and its nature was such as to bring it within the exception provided in Section 1671 of the Civil Code. On this point the court on page 593 states:

"That *looking to the entire agreement, its scope, purpose and subject matter* and considering the result of the breach and the reasonableness of the sums agreed to be paid, it is clear there was an intent to estimate a just compensation for the loss sustainable in the event of a failure to comply with the agreement."

So in the case at bar, it likewise should be said:

“That looking to the entire agreement, its scope, purpose and subject matter and considering the result of a breach and the reasonableness of the sums agreed to be paid, it is clear that there was an intent to estimate a just compensation for the loss sustainable in the event of a failure to comply with the agreement.”

In fact this very court in the case of *Blodgett v. Columbia Live Stock Company*, supra, cited above, has said that an oil-well drilling contract similar in all essentials to the one in review here shows upon its face that the damages resulting from a breach

“would necessarily be indefinite, uncertain and speculative. It was therefore eminently proper that the parties should fix said damages by mutual agreement.”

and in effect held that in such a case it is unnecessary to allege facts already appearing from the contract itself.

In the *Dyer Bros. Iron Works* case, supra, the court, as appears from the extract of its opinion above quoted, cited *Long Beach School District v. Dodge*, 135 Cal. 401 and *Los Angeles Association v. Pacific Surety Co.*, 24 Cal. App. 95. In the *Long Beach District* case the contract sued upon was for the erection of a High School building within a certain time wherein it was provided that the contractor pay ten (\$10) dollars a day as liquidated damages for every day that the said building remained incomplete

after the first day of February, 1898. Plaintiff offered evidence to prove that it was impracticable to fix the amount of actual damage, which evidence was admitted over defendant's objection. The court held that the said evidence was inadmissible as there was no averment in the complaint bringing the case within the exception provided for in Section 1671 of the Civil Code, as it did not appear from the contract that it would be impracticable or extremely difficult to fix the actual damage. The court said on page 404:

"As an illustration that such evidence is necessary suppose the High School, during this period, occupied a leased building equally as well adapted to the purposes of the school as the one contracted to be erected, the damage sustained by the district would obviously be the rent of the building, and in such case stipulated damages could not control. It is clearly incumbent upon the party seeking to recover upon such agreement to show by averment and proof that his case is within the exception. Certainly the stipulation in the bond does not of itself, in the absence of all other evidence upon the subject, make it clear that it would be extremely difficult or impracticable to fix the actual damages that would result from the breach of the bond in not finishing the building by a certain day."

Again in the case of *Los Angeles Association v. Pacific S. Company*, the complaint was based upon an agreement to pay one thousand dollars as liquidated damages in case of failure to furnish capable



Japanese labor for picking and harvesting plaintiff's olive crop. The court, speaking of the evidence said:

"It may or may not show the contract which Tajari is alleged to have abandoned was one, the nature of which rendered it impossible to fix the actual damages."

In other words this court held that the nature of the contract was such that it did not show in itself that it was impracticable and extremely difficult to fix actual damages.

The two cases last above referred to plainly are not cases in which the contracts in question show upon their face that it would be impracticable or extremely difficult to fix the actual damage sustained in case of breach. In such cases it may be that it must be alleged that it was impracticable and extremely difficult to fix the actual damages. But such cases are much different from the one at bar in which the contract itself shows that the nature of the case is such that it would be impracticable to fix the actual damages.

It is to be noted that in the case at bar it appears from the contract set forth in the complaint that defendant in error in consideration of the signing of the contract by plaintiff in error dismissed a suit which it had pending against plaintiff in error. What would have been the outcome of this suit? Defendant in error may have recovered judgment therein. This possibility defendant in error waived

as an inducement to plaintiff in error to agree that the Associated Oil Company would drill the well in question. The uncertainty of the outcome of said litigation is an added feature showing that it was impracticable or extremely difficult to fix the damages suffered by defendant in error in case plaintiff in error did not perform his contract.

Second: In cases involving contracts, such as oil-well drilling contracts, where it is proper for the parties to agree upon liquidated damages, actual damages are not an issue. In the case of *Wood v. Niagara Falls Paper Company*, 121 Fed. 818, this point was squarely presented and decided. The contract in suit related to the purchase and installation of certain machinery and provided that one hundred dollars per day was to be paid as liquidated damages for delay. The court held that such stipulated damages could not be construed as a penalty and that the plaintiff could not defeat or reduce recovery by showing that defendant sustained no actual loss by delay. The trial court excluded all evidence designed to show that no damages were suffered. This ruling was upheld by the appellate court, a portion of its opinion being as follows:

“It is urged however that when it is made to appear in an action for a breach of contract that no actual damages have arisen, notwithstanding that the parties have agreed upon liquidated damages, the party in default is entitled to be relieved. That proposition is not sustained by weight of authority. On the con-

trary according to the authority which is controlling upon this court the law is that the naming of a stipulated sum in such a contract to be paid for the non-performance of the contract is conclusive upon the parties in the absence of fraud or mutual mistake and evidence aliunde in respect to damages actually arising from a breach can not be received. Courts lean against forfeitures and toward construing such stipulations as penalties instead of liquidated damages when the amount on the face of the contract is out of all proportion to the *possible loss*. The question of this proportion has been simply an element entering into the consideration of the question of what was the intent of the parties, whether bona fide to fix damages or to stipulate an arbitrary sum as a penalty by way of security."

The case of *Wood v. Niagara Falls Paper Company* was reviewed and approved in the case of *Bosch Magneto Company v. Rushmore*, 255 Fed. 465. In the case of *Gibson v. Oliver*, 27 Atl. Rep. 961 (Pa.), the complaint was based upon an oil-well drilling contract providing for liquidated damages. In his answer defendant claimed that plaintiff was not entitled to the stipulated damages because wells drilled in the vicinity after the contract in suit was executed showed that there was no oil on the premises in question. The court held that this was no defense. The same defense was presented in the case of *Springer v. Citizens Gas Company*, 22 Atl. Rep. 986 (Pa.), and held insufficient by the court. It is to be noted that the case of *Gibson v. Oliver*, *supra* was cited with approval by the California Su-

preme Court in the case of *Escondido Oil Company v. Glasier*, supra.

The authorities on the question whether actual damages are in issue where the parties have agreed upon liquidated damages are collected in a note to paragraph 264, 17 Corpus Juris, page 965. Paragraph 264 reads as follows:

“Necessity of actual damages. The generally accepted rule is that proof of actual damage is unnecessary in order to recover a sum as liquidated damages. There are however some authorities that hold that proof of merely nominal damages will not support such a recovery and the view has also been taken that where the Court can see where no damages have been sustained, or there is no proof of damage, the provision for liquidated damages will not be enforced. However this would seem to be a statement in another form of the rule that the Court will not deem it to have been the intention of the parties to provide for liquidated damages where the sum reserved is grossly disproportionate to the damages sustained.”

The cases cited in Corpus Juris as authority for the minority rule referred to in the above quotation are really not in point. For example: The leading case cited is *The Columbia*, 197 Fed. 661, in which the court reviewed a contract providing for the payment of demurrage. The court said:

“My construction of the contract is that the libellant would pay damages as compensation for any loss the ship might suffer by the delay in completing the work on her. I find no evi-



dence to show that she suffered any pecuniary loss.”

In other words the court construed the contract to mean an agreement to pay the *actual amount* of damages suffered by delay in completing repairs on the ship. The basis of the court’s construction of the contract was the meaning of the word “demurrage”.

In any event the Supreme Court of the United States in the case of *Sun Publishing Company v. Moore*, 163 U. S. 682, upholds the principle that the question of actual damages is not pertinent in a case where the parties have properly agreed upon liquidated damages. In the *Sun Publishing* case the authorities are extensively reviewed and such cases as *Gay Manufacturing Company v. Camp*, 65 Fed. 794, cited by plaintiff in error, repudiated. This repudiation is in effect a repudiation of *Northwestern Fixture Company v. Kilborne*, 128 Fed. 256, cited by plaintiff on page 19 of his opening brief as authority for the proposition.

“That a provision even for liquidated damages will not be enforced where no damages whatever have been sustained.”

In the *Kilborne* case, *supra*, the contract in question was not an oil-well drilling contract, but an agreement by the defendant to sell sufficient of its stock in trade to pay off creditors and to turn the balance over to plaintiff in exchange for a portion of

plaintiff's capital stock. Defendant agreed to pay ten thousand dollars as liquidated damages for any default on its part. The court construed this contract to provide for a penalty and not liquidated damages. It therefore is not authority for the proposition that when a contract rightfully provides for liquidated damages evidence that no actual damages were sustained is admissible.

Plaintiff in error contends that the provision in the contract in suit for the payment of ten thousand dollars as liquidated damages is in fact a provision for the payment of a penalty. We submit that this contention is fully answered by the cases above cited by defendant in error. It is apparent that the contract does not contain a number of separate covenants of varying degree of importance, for the breach of any of which the stipulated sum of ten thousand dollars was to be paid. The object of the contract is single and its provisions all relate to that single object, namely, the drilling of the oil well within the time agreed. A similar contract was upheld as properly providing for liquidated damages and not a penalty in *Escondido Oil Company v. Glasier*, supra, and the other cases above cited.

The contention that the obligation of plaintiff in error to pay the stipulated sum of ten thousand dollars is collateral to another agreement and therefore must be construed as a penalty is not tenable. Plaintiff in error does not point out what the other agreement is to which the provision for liquidated

damages is collateral. The object of the contract in suit was to get the oil well drilled in the manner and within the time agreed. Surely it can not be successfully contended that the agreement to pay ten thousand dollars as liquidated damages was collateral to such object. If it be held that it is collateral to such object then the fact that it is collateral would seem to offer no objection, for the courts show no hesitancy in upholding similar agreements, as shown by the authorities above cited. The fact that in the contract plaintiff in error agreed that the Associated Oil Company would drill the well in question instead of agreeing to do so himself does not change the nature of the contract or make it a betting proposition, as plaintiff in error suggests. The object of the contract is the same whether plaintiff in error agreed personally to accomplish that object or to have the Associated Oil Company accomplish it for him. It is just the same from a legal standpoint.

Plaintiff in error also contends that the contract in suit provided for a penalty and not liquidated damages because the provision for the payment of the ten thousand dollars was in effect security for performance and not a sum to be paid in lieu of performance, citing 17 Corpus Juris, 933. It is quite apparent from reading the contract that if plaintiff in error did not perform said contract he was to pay the sum of ten thousand dollars as liquidated damages. Certainly this sum was to be paid

in lieu of performance. In arguing this point plaintiff in error states on page 13 of his brief:

“That the guaranty executed by this defendant gave the Associated Oil Company no choice of anything in lieu of performance.”

The obvious answer to this statement is that the contract was not with the Associated Oil Company. The Associated Oil Company owed no duty to defendant in error or defendant in error to Associated Oil Company as there was no privity of contract between them.

The remaining contention of plaintiff in error is that the contract in suit is a contract of guaranty, or in other words, a contract by which plaintiff in error

“promised to answer for the debt, default or miscarriage of another person;”

that the Associated Oil Company was that other person and that plaintiff in error was discharged from any obligation under his contract of guaranty because the Midnight Oil Company and defendant in error failed to perform the provision of the contract, the performance of which was guaranteed, namely, the contract between the Midnight Oil Company and the Associated Oil Company relating to the drilling of the well in question. Plaintiff in error argues that by the terms of the said contract the Midnight Oil Company and defendant in error were obligated to deliver the possession of the



property in question to the Associated Oil Company; that the delivery of such possession was a condition precedent to the obligation of the Associated Oil Company to drill; that the failure to perform this condition precedent naturally released the Associated Oil Company from any obligation to perform and consequently released plaintiff in error from any and all obligations under his contract of guaranty. A careful examination of the documents attached to the answer of plaintiff in error and the instrument sued upon discloses the weakness of the foregoing argument. In the first place defendant in error was not a party to the contract, the performance of which by the Associated Oil Company, plaintiff in error claims he guaranteed. That contract is one solely between the Hopewell Oil Company and the Associated Oil Company. (Tr. page 19.) It is true, the Hopewell Oil Company assigned a portion of the benefits of its said contract with the Associated Oil Company to defendant in error (Tr. pages 26, 27, 28), but by the terms of the assignment defendant in error does not assume or agree to assume any of the obligations of the Hopewell Oil Company in its contract with the Associated Oil Company. It merely was to receive

“the royalties and benefits accruing or hereafter accruing to the Hopewell Oil Company from the Associated Oil Company.”

It is self-evident that an assignment by the Hopewell Oil Company of a portion of the royalties and

benefits which it expected to receive from its contract with the Associated Oil Company created no privity of contract between the Associated Oil Company and defendant in error. It follows therefore that defendant in error was under no legal obligation to perform any of the terms and conditions of the said contract on the part of the Hopewell Oil Company to be performed. This being true, it is difficult, if not impossible, to see how defendant in error by its failure to deliver the possession of the property to be drilled upon by the Associated Oil Company violated any duty either to the Associated Oil Company or to plaintiff in error. Surely it can not be successfully shown, so far as the record in this case is concerned, that there was any obligation on the part of defendant in error to dispossess those third parties whom plaintiff in error claims were holding the property in question adversely to defendant in error as well as to the Associated Oil Company. It is a well settled principle of law that the interference of a third party, unless provided for in the contract, is no excuse for the failure of a party to the contract to perform its terms and conditions on his part to be performed.

13 Corpus Juris 637;

6 R. C. L., pp. 1014, 1015;

*Roberts v. Am. Col. & Lbr. Co.* (W. Va.),  
85 S. E. 535;

*Stone v. Dennis*, 3 Port. (Ala.) 231;

*Gulf Ref. Co. v. Pegash Bros.* (Texas), 146  
S. W. 719.

If plaintiff in error had merely guaranteed that the Associated Oil Company would perform its said contract with the Hopewell Oil Company and the Hopewell Oil Company had prevented the Associated Oil Company from performing its said contract then it might well be argued that plaintiff in error would have been released of all obligations under his guaranty. But plaintiff in error did not guarantee that the Associated Oil Company would perform its contract with the Hopewell Oil Company. The agreement with plaintiff in error was that the Associated Oil Company would drill the oil-well in question commencing on or before the 15th day of June, 1919, and continue said drilling, barring unavoidable delays, until the oil well was completed. It is plain to be seen that this agreement was absolutely independent of any agreement which the Associated Oil Company had with the Hopewell Oil Company, and that it in no manner purports to guarantee the performance of that contract. It is a direct agreement by plaintiff in error that the Associated Oil Company would do a certain thing, namely, drill an oil-well. That contract was broken when the Associated Oil Company failed to drill said well. Defendant in error dismissed its suit against plaintiff in error in order to get this positive agreement from plaintiff in error. Defendant in error evidently desired to have some further assurance that the Associated Oil Company would drill the well other than the mere agreement of the Asso-

ciated Oil Company with the Hopewell Oil Company to do so in case the Hopewell Oil Company performed certain acts such as the delivery of the possession of the property in question.

Plaintiff in error claims that the trial court erred in overruling the demurrer to the complaint because the complaint does not allege

“That the Associated Oil Company was not prevented by unavoidable delays from commencing to drill and thereafter to complete the well provided for in the contract.”

In the first place there is no provision in the contract excusing a failure to commence drilling by the 15th day of June, 1919. The unavoidable delay portion of the contract refers to delays after drilling had once commenced. The reason for this distinction is quite apparent because the lease between the Hopewell Oil Company and The Western States Oil and Land Company provided for a forfeiture in case drilling operations were not commenced on or before the 15th day of June, 1919. However the above matter which plaintiff in error claims defendant in error should have alleged in its complaint is in its nature a matter of defense. It certainly would not be up to defendant in error to prove a negative or facts which are presumably within the sole knowledge of plaintiff in error or the Associated Oil Company.

Plaintiff in error also claims that the court erred in directing judgment to be entered in favor of



plaintiff and against defendant in accordance with the prayer of plaintiff's complaint, because the court should have required defendant in error to prove by evidence that it was impracticable or extremely difficult to fix actual damages and that defendant in error had suffered some damage as the result of the breach of contract by plaintiff in error. These points have been fully covered in the first portion of this brief to which reference is hereby made.

In conclusion, and by way of summary, defendant in error contends, as follows:

(1) That the contract between plaintiff and defendant in error was not a contract of guaranty, but a positive and independent agreement that the oil-well in question would be drilled in the manner specified; that no action taken by the Hopewell Oil Company or failure of the Hopewell Oil Company to act in relation to its contract with the Associated Oil Company in any manner affected the obligations existing between plaintiff in error and defendant in error.

(2) That there was no privity of contract between defendant in error and the Associated Oil Company, and that therefore defendant in error was under no legal duty to deliver possession of the property in question to the Associated Oil Company; that there was no agreement between plaintiff in error and defendant in error to the effect that defendant in error would deliver possession of the

property in question to the Associated Oil Company; that therefore plaintiff in error can not resort to such failure as a defense.

(3) That if some independent agency over whom defendant in error had no control, to-wit: third parties, claiming the real property in question adversely to defendant in error and others, interfered to prevent the Associated Oil Company from drilling the well in question it was no affair of defendant in error. Certainly such third parties were in no sense the agents of defendant in error and in absence of a contract to that effect it cannot be held legally for their acts; that so far as the parties to this action are concerned it was up to plaintiff in error to see that the Associated Oil Company was placed in possession of the property so as to enable it to drill. Of course it would be an entirely different matter if the answer alleged or in any manner showed that plaintiff in error had done anything to prevent the Associated Oil Company from commencing to drill or drilling the well in question, but the answer plainly alleges that the reason why the Associated Oil Company did not drill as agreed was because third parties claiming adversely to defendant in error prevented such drilling by refusing to permit the Associated Oil Company to go into possession of the property.

(4) That all that is required of a complaint seeking to recover liquidated damages is that it show that the nature of the case is such that it would be

impracticable or extremely difficult to fix actual damages; that when the contract sued upon itself does not show that it was a proper case for the parties to stipulate the damages, then the pleader may be required to allege and prove that it was impracticable and extremely difficult to fix the damages, but that no such requirement is made when the contract sued upon shows upon its face that it is impracticable and extremely difficult to fix the damages which would be occasioned by its breach; that the denial in the answer in the case at bar that it was impracticable to fix the actual damages is a denial which is refuted upon the very face of the complaint, thereby entitling defendant in error, so far as such denial is concerned, to judgment upon the pleadings.

(5) That in a contract where the parties have properly agreed upon liquidated damages the question of actual damages is eliminated and such question therefore becomes irrelevant in a suit based upon such contract.

For the foregoing reasons judgment of the trial court should be sustained.

Dated, San Francisco,

June 29, 1923.

Respectfully submitted,

DANA, BLOUNT & SILVERSTEIN,

DUDLEY D. SALES,

*Attorneys for Defendant in Error.*

No. 3994

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IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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H. ALLEN RISPIN,

*Plaintiff in Error,*

VS.

THE MIDNIGHT OIL COMPANY

(a corporation),

*Defendant in Error.*

---

**CLOSING BRIEF FOR PLAINTIFF IN ERROR.**

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## CLOSING BRIEF FOR PLAINTIFF IN ERROR.

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In reply to the able Brief for Defendant in Error, plaintiff in error makes the following points:

- I. The discharge from liability of the Associated Oil Company, discharged plaintiff in error.
- II. Although some authorities indicate that a complaint for liquidated damages need not allege the amount of actual damage, they do not go so far as to dispense with proof of some damage where it is alleged in the answer that no damage occurred.

- III. The allegation contained in the answer, that the Associated Oil Company was barred by unavoidable delays, constitutes a defense to the cause of action pleaded.
- IV. Plaintiff in error is entitled to have the propriety of liquidated damages tried as an issue of fact.
- V. The contract in this case provides for a penalty and not for liquidated damages. A guaranty is always penal and cannot provide for liquidated damages.
- VI. Conclusion.

The above arrangement of points does not follow the argument in the Brief for Defendant in Error, but we deem it the more logical order because until Point I, *supra*, is first disposed of, the other points are not even involved in the case. That is to say, plaintiff in error deems that the judgment should be reversed with directions to enter judgment in favor of plaintiff in error, on Point I, *supra*, and that the court will even find it unnecessary to pass on the remaining points.

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**I. THE DISCHARGE FROM LIABILITY OF THE ASSOCIATED OIL CO. DISCHARGED PLAINTIFF IN ERROR.**

Defendant in error has three answers to our first proposition, viz.:

- (a) The contract sued upon is not a guaranty;

- (b) Admitting that the Associated Oil Company was prevented from drilling the well because it was not put into possession of the land by its lessors, still plaintiff in error was not thereby discharged because defendant in error was not obligated to deliver possession to the Associated;
- (c) Performance by the Associated was prevented by strangers to the contract, and hence the failure to perform is not excusable.

Plaintiff in error replies to these answers as follows:

**A. "The Contract Sued Upon Is Not a Guaranty."**

Learned opposing counsel in his brief states (Brief for Defendant in Error, p. 18):

"It is plain to be seen that this agreement is absolutely independent of any agreement which the Associated Oil Company had with the Hopewell Oil Company; and that it in no manner purports to guarantee the performance of that contract."

We respectfully refer the court to the instrument itself (Trans. Rec., pp. 2-4).

The third recital contained in the instrument expressly refers to the contract between the Hopewell Oil Company and the Associated Oil Company, showing clearly that the parties were contracting expressly in reference to it.



The fourth recital states the obligation of the Associated Oil Company *in the exact language* of the contract between the Associated and the Hopewell.

The agreement itself expressly recites:

“ \* \* \* \* the undersigned [plaintiff in error] hereby *guarantees* that the said Associated Oil Company, or its assigns, will drill \* \* \* ”

and then follows the language of the agreement *in the exact words and punctuation of the Hopewell-Associated agreement.*

We submit that there is absolutely no distinction possible between the contract executed by plaintiff in error and the common, ordinary, everyday contract signed by a surety company which guarantees the performance of work by a contractor in erecting a building or doing public work.

B. “Admitting that the Associated Oil Co. Was Prevented from Drilling the Well Because It Was Not Put Into Possession of the Land by Its Lessors, Still Plaintiff in Error Was Not Thereby Discharged Because Defendant in Error Was Not Obligated to Deliver Possession to the Associated.”

The conclusion urged depends upon two premises, first, that defendant in error was not obligated to deliver possession, and second, that if defendant in error was not thus obligated, plaintiff in error was not discharged. Both premises are false, so the conclusion falls to the ground.

Taking up first the question of the liability of defendant in error to deliver possession, these are

the facts: The Hopewell Oil Company had an oil lease from the Western States Oil and Land Co. covering the lands described in the guaranty sued upon as well as other lands (Trans. Rec. p. 8). The Hopewell Oil Company entered into a contract with the Associated Oil Co. to develop said lands (Trans. Rec. pp. 19-26); the first provision of said contract was as follows (Trans. Rec. p. 20):

“1. The said party of the first part [The Hopewell Oil Company] shall immediately deliver possession of said lands to the party of the second part [Associated Oil Co.] for operation under the terms of said lease, and under the terms of this agreement.”

Said contract also provided as follows (Trans. Rec. p. 24):

“9. The provisions, conditions, covenants and agreements herein contained shall inure to the benefit of *and be binding upon* the successors and assigns of the parties hereto.”

The Hopewell Oil Company then assigned part of the lands covered by its lease from The Western States Oil and Land Company and also covered by its agreement with the Associated Oil Company to defendant in error; this assignment was an instrument in writing, executed by both parties thereto, and set forth in full in the record (Trans. Rec. pp. 26-30); this assignment expressly recited (Trans. Rec. pp. 27-28):

“To Have and to Hold by the said The Midnight Oil Co. [defendant in error], its successors

and assigns, subject, however, to all the terms, conditions, agreements, covenants and royalties expressed in said lease, which said terms, conditions, agreements, covenants and royalties The Midnight Oil Company agrees to keep, perform and pay so far as it relates the above described land assigned to it *and subject to the said operating contract as to all of the terms, conditions, agreements and covenants therein contained.*"

The assignment also expressly recited (Trans. Rec. p. 27) :

*"the purpose of this agreement being to subdivide both said lease and the said operating contract as above set forth."*

The operating agreement expressly provided that it should be binding upon the successors and assigns of the parties; defendant in error joined with The Hopewell Oil Company in expressly reciting that it was their intention "to subdivide said lease and the said operating contract"; the assignment expressly provided that it was subject to all of the terms, conditions, agreements and covenants of the operating contract, and yet defendant in error says it was not bound to deliver possession of the land to the Associated.

It is obvious that defendant in error and the Hopewell Oil Company intended to, and actually did, subdivide the land, lease and operating contract so that each should have the benefit accruing from its portion and be subject to all the burdens appertaining to the same. They could not have expressed

this intent in more positive or appropriate language than they did.

If there is nothing in the record to indicate that defendant in error ever had possession of the land, neither is there anything to indicate that the Hopewell Oil Company ever did either. It was that part of the land assigned to defendant in error which the Associated was to commence drilling upon (Trans. Rec. p. 3). The uncertain condition of the title was clearly present to everyone's mind, as is attested by paragraph 6 of the Hopewell-Associated agreement (Trans. Rec. p. 23). It is inconceivable that the Hopewell Oil Co. intended that it should be liable to deliver possession to the Associated when it had disabled itself from so doing by assigning to defendant in error. According to learned counsel's views the defendant in error might have sublet this land to say the Standard Oil Co. and then have sued plaintiff in error because the Associated did not drill.

We, therefore, submit that defendant in error clearly rendered performance by the Associated Oil Company impossible by its own default, and that this case very clearly comes under the authorities cited in our opening brief.

But it is not even necessary to examine and construe these different instruments in order to dispose of learned counsel's argument. His argument assumes that it is only where a principal obligor is



relieved by default of the obligee, that the guarantor is discharged. There is no such qualification to the rule. In every case, where the principal obligor is relieved, the guarantor is relieved also. Therefore, the only material fact in disposing of learned counsel's argument is the fact that the Associated Oil Company was discharged, and it is perfectly immaterial whether defendant in error rendered performance impossible or whether the Associated was discharged for other reasons. Even defendant in error admits that the Associated Oil Company was relieved of liability and that admission alone requires a reversal of the judgment.

**C. "Performance by the Associated Was Prevented by Strangers to the Contract, and Hence the Failure to Perform Is Not Excusable."**

Defendant in error argues that performance was prevented by strangers and that hence plaintiff in error is not relieved. This argument has no application because the principal obligation expressly provided that possession must be given to the Associated Oil Company. Possession was not given and the Associated Oil Company was relieved. The rule of law invoked by learned counsel has no application.

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It is thus apparent that defendant in error has failed to overcome the first obstacle. The three argu-

ments offered are all without merit. The fact that the principal obligor is admitted to have been discharged disposes of this case.

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II. ALTHOUGH SOME AUTHORITIES INDICATE THAT A COMPLAINT FOR LIQUIDATED DAMAGES NEED NOT ALLEGE THE AMOUNT OF ACTUAL DAMAGE, THEY DO NOT GO SO FAR AS TO DISPENSE WITH PROOF OF SOME DAMAGE WHERE IT IS ALLEGED IN THE ANSWER THAT NO DAMAGE OCCURRED.

The answer alleges that defendant in error sustained no damage at all (Trans. Rec. p. 11). The demurrer to the answer admits this fact. For the purposes of this review, it must be taken just as though the fact were proved after trial and found as a fact.

Defendant in error misconstrues our answer where it states (Brief for Defendant in Error, p. 10):

“In his answer defendant claimed that plaintiff was not entitled to the stipulated damages because wells drilled in the vicinity after the contract in suit was executed showed that there was no oil on the premises in question.”

Our answer denies unequivocally that defendant in error sustained any damage at all and the denial is not limited or qualified in any way (Trans. Rec. p. 11).

Learned counsel also misconstrues the decision in *Sun Publishing Company v. Moore*, 183 U. S. 642; 46 L. ed. 366.

That decision is not in any way in conflict with *Northwestern Fixture Co. v. Kilbourne*, 128 Fed. 256, decided by this Honorable Court and cited in the Opening Brief for Plaintiff in Error. In the *Sun Publishing Co.* case, defendant attempted to show what the actual damages were, which is immaterial under all the authorities. Plaintiff in error here does not offer to show what the actual damages were—we set up in defense that there was absolutely no damage at all. We admit that if it be conceded to be a proper case for liquidated damages, that the actual amount of damages sustained is immaterial, but we earnestly urge that under well settled authorities which do not constitute a minority rule, that recovery cannot be had when no damage at all has been suffered.

In the case of

*Bosch Magneto Co. v. Rushmore*, 255 Fed.  
465,

the question was not involved in any way.

In the case of

*Wood v. Niagara Falls Paper Co.*, 121 Fed.  
818,

the court intimated that in a close case the fact of no damage should incline the court to construe the contract as for a penalty rather than liquidated damages. The court was dealing with a clear case, however, for which reason it did not so construe the contract.

The decision of *Wood v. Niagara Falls Paper Co.*, supra, is apparently in conflict with the rule of this Circuit, as stated in *Northwestern Fixture Co. v. Kilbourne*, supra, but we know of no reason for referring to the rule of this Circuit as the minority rule, and it was certainly not repudiated by the Supreme Court of the United States in the *Sun Publishing Co.* case.

The reason of the rule of liquidated damages clearly shows the fallacy of learned counsel's argument.

Stipulated damages presupposes that the plaintiff has actually suffered substantial damages but that there is difficulty in measuring the *amount* thereof. Damage being admitted, the law for convenience permits the parties to stipulate an arbitrary amount rather than resort to the ordinary rules applicable.

But where there is no damage, rules of measuring damages are inapplicable and so are substitutes for those rules. There can be no difficulty in measuring damage when there is no damage. The rule dispensing with proof of the amount of damage does not obviate the necessity of showing that damage was actually suffered when the issue is properly raised.

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**III. THE ALLEGATION CONTAINED IN THE ANSWER THAT THE ASSOCIATED OIL COMPANY WAS BARRED BY UN-AVOIDABLE DELAYS, CONSTITUTES A DEFENSE TO THE CAUSE OF ACTION PLEADED.**

The Associated-Hopewell agreement provided (Trans. Rec. p. 21):



"3. Said party of the second part \* \* \* shall within sixty days from the date hereof place on said lands drilling materials, and shall begin actual drilling of an oil well thereon on or before the 15th day of June, A. D. 1919, with a rig capable of reaching a depth of four thousand (4000) feet, and shall prosecute the work of drilling said well continuously thereafter, *barring unavoidable delays*, until such well shall reach the depth of and test out the known productive oil sands in the Lance Creek oil field, unless oil in commercial quantities shall be found in said well at less depth."

The guaranty sued upon provides (Trans. Rec. p. 3):

" \* \* \* the undersigned hereby *guarantees* that the said Associated Oil Company, or its assigns, will drill and complete a well on said last above-described premises commencing on or before the 15th day of June, 1919, with a rig capable of reaching a depth of four thousand (4000) feet, and shall prosecute the well continuously thereafter, *barring unavoidable delays*, until such well shall reach the depth of and test out the known productive oil sands in the Lance Creek Field, unless oil in commercial quantities shall be found in said well at a lesser depth. \* \* \* "

The complaint fails to allege that the Associated Oil Company was not barred by unavoidable delays, for which reason we believe it fails to state a cause of action. That becomes unimportant, however, because the answer expressly alleges (Trans. Rec. p. 10):

" \* \* \* that said Associated Oil Company was barred by delays unavoidable on its part,

from drilling or commencing to drill a well on said premises, on or before said 15th day of June, 1919."

Not only the principal obligation, but the contract here sued upon both contain the limitation "barring unavoidable delays". If the default set up by defendant in error comes within the limitation, it is of course a perfect defense to the cause of action alleged.

Defendant in error meets this difficulty as follows (Brief for Defendant in Error, p. 19):

"In the first place there is no provision in the contract excusing a failure to commence drilling by the 15th day of June, 1919. The unavoidable delay portion of the contract refers to delays after drilling had once commenced. The reason for this distinction is quite apparent because the lease between the Hopewell Oil Company and The Western States Oil and Land Company provided for a forfeiture in case drilling operations were not commenced on or before the 15th day of June, 1919. However, the above matter which plaintiff in error claims defendant in error should have alleged in its complaint *is in its nature a matter of defense*. It certainly would not be up to defendant in error to prove a negative or facts which are presumably within the sole knowledge of plaintiff in error or the Associated Oil Company."

Defendant in error argues that it is a matter in defense, apparently overlooking the fact that we did raise it as a defense and expressly set it up in our answer.

But learned counsel argues also that the words "barring unavoidable delays" do not apply to a failure to commence drilling but only to a failure to continue drilling. The question therefore is: Does the phrase "barring unavoidable delays" in the contract of guaranty modify the immediately preceding clause alone, or does it modify all of the similar, preceding clauses dealing with the same general subject?

The court will of course apply to this problem all of the well known rules applicable to the construction of contracts. No reason suggests itself to plaintiff in error, however, to give the phrase the restricted scope which defendant in error would wish. It follows alike all of those phrases specifying the things which the Associated Oil Company was to do; following it come provisions of a different character. No reason of sense suggests itself as to why plaintiff in error should require more protection against unavoidable delays after drilling had commenced than before. Learned opposing counsel says the reason is apparent—that the original lease provided for a forfeiture in case drilling was not commenced by June 15th, 1919. We are unable to see how this circumstance affects the situation. We are not construing the principal obligation but the guaranty, and Rispin would not be more likely to take the chance of having to pay \$10,000 because of circumstances out of the control of the principal obligor in one case than he would in the other.

This defense has a twofold effect. It is a defense to plaintiff in error under an explicit limitation in the guaranty and is also an indirect defense as showing a discharge of the principal obligor. We submit that it raises a material issue that must be disposed of before judgment can be rendered.

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IV. PLAINTIFF IN ERROR IS ENTITLED TO HAVE THE QUESTION OF THE PROPRIETY OF LIQUIDATED DAMAGES TRIED AS AN ISSUE OF FACT.

Plaintiff in error denied that damages would be impracticable or extremely difficult to fix and alleged that damages could be very easily fixed. The demurrer to the answer admits these facts. It being thus admitted that liquidated damages are unwarranted by law, can the judgment be affirmed?

This question does not arise upon demurrer to the complaint. It is not a mere question of pleading to ascertain whether from a given state of facts it follows as a conclusion of law that the damages necessarily would be difficult to fix. This question arises as an affirmative defense to which a demurrer has been interposed and which has been made the basis of a judgment. It is exactly as though the fact were proved after trial and a finding to that effect made by the court.

Decisions of courts which merely pass upon the sufficiency of complaints and which merely decide



the necessity of alleging the difficulty of fixing damages, are not necessarily in point. It is one thing to say that one need not allege the difficulty of fixing damages and quite another to say that plaintiff could still recover although the contrary clearly appeared. The decisions must be examined keeping this distinction in mind and the language of courts must be construed in the light of how the question was presented.

Defendant in error submits no authority against our position which is in point. In

*McComber v. Kellerman*, 162 Cal. 749, cited by learned counsel, it appeared by *proof* that the case was a proper one for liquidated damages. The court never said or intimated in its opinion, that if it had appeared by proof that it was *not* a proper case for liquidated damages that plaintiff could still recover. And in the case at bar, it must be assumed to be *proved* that it is not a proper case for liquidated damages.

In

*Escondido Oil Co. v. Glaser*, 144 Cal. 494, we have a similar situation. The question arose on demurrer to the complaint. The court never said that even though it affirmatively appear that it is an improper case for liquidated damages, plaintiff could still recover. It merely decided that on the facts of that particular case it was not necessary to allege that the damages were difficult to fix.

And similarly in

*Blodget v. Columbia Live Stock Co.*, 164 Fed.  
305,

decided by this Honorable Court and cited by defendant in error. It did not there appear that it was *not* difficult or impracticable to fix the damages and indeed, the trial court found as a fact that the actual damages could *not* be determined. Judge Ross certainly never said that even if it appeared that actual damages were easy to ascertain that liquidated damages would nevertheless be given.

We must disagree also with learned counsel's reading of

*Dyer v. Central Iron Works*, 182 Cal. 588.

The court there certainly did say that the complaint would have been defective in the absence of an allegation that damages would be difficult to fix. That is not important, however, because plaintiff in error concedes that from certain facts it may well follow as a conclusion of law that damages would be difficult to ascertain. But neither the Supreme Court of California, nor this Honorable Court, nor any other so far as the writer is aware, has ever decided or even intimated that liquidated damages could ever be upheld in a case where it was clearly established by both pleading and proof that damages were not difficult or impracticable to fix. And the demurrer to the answer in the case at bar admits those facts.

There is a possible answer to our contention which learned opposing counsel does not suggest, but which will readily occur to the court, namely this: In a case where it follows as a conclusion of law from the facts pleaded that damages are difficult to fix, can the defendant put the propriety of liquidated damages in issue without denying the facts? In such case, is not a denial that damages are difficult to fix, a mere conclusion of law which cannot stand against the admitted facts? The answer is very clear. Difficulty of fixing damages must be alleged where the difficulty is not obvious. Where the difficulty is obvious, it need not be alleged. But precisely as the difficulty may really exist in cases where common experience would not lead one to suspect it, so also it may not really exist in cases where common experience would lead one to suspect that it did. In the former contingency, the pleader need only allege the fact that damages are difficult to fix in order to secure his day in court upon that issue. Is it possible to suggest a valid reason why in the latter contingency the pleader may not have his day in court by denying the fact?

---

**V. THE CONTRACT IN THIS CASE PROVIDES FOR A PENALTY AND NOT FOR LIQUIDATED DAMAGES. A GUARANTY IS ALWAYS PENAL AND CANNOT PROVIDE FOR LIQUIDATED DAMAGES.**

In our opening brief we set forth all of the tests known to the law for determining whether a con-

tract provides for a penalty or for liquidated damages, and demonstrated how the contract herein meets all the requirements of a penalty and fails to meet any of the tests of liquidated damages. Defendant in error replies with great brevity and cites a single decision culled from our own opening brief.

We have argued that if a gross sum is stipulated to be paid for any failure to fulfill an agreement consisting of several parts, and the sum is payable for a breach of any one of them, that the sum stipulated is a penalty. On page 15 of our opening brief and following we cite numerous authorities. The case of *Escondido Oil Company v. Glasier*, cited by defendant in error, is in line with the other authorities cited by plaintiff in error, and we ourselves cite it and explain it in our opening brief. Defendant in error does not cite a single decision holding contrary to the decisions cited on pages 15 and 16 of our opening brief. The rule is applied by all courts everywhere.

Defendant in error offers but one possible answer to these authorities. Learned counsel says it is apparent that the contract does not contain a number of separate covenants of varying degrees of importance, for the breach of any one of which plaintiff in error would be liable in the sum of \$10,000.00. Plaintiff in error respectfully refers the court to page 17 of its opening brief, on which page are listed some of the diverse acts for the performance of every one of which plaintiff in error was bound in



the sum of \$10,000.00. Defendant in error ignores this categorical demonstration. Its correctness cannot be disputed and it places the contract in this case on all fours with the leading cases cited in our brief.

Even the cases cited by defendant in error say that where the disparity is great between the actual damage and the stipulated sum, that the courts should incline to construe the provision as for a penalty, and in the case at bar the disparity is admitted to be the disparity between zero and \$10,000.00.

To our argument that collateral agreements are always construed to be penalties, defendant in error likewise has to admit the correctness of the rule and rest his case on a denial of the fact. To deny that the contract involved in this case is collateral is to lean against a very slight reed, however. Every contract of guaranty is collateral. Every text, encyclopedia and decision so defines it. What else could a secondary obligation be but collateral?

We confidently assert that it is impossible in law to stipulate damages at all in a contract of guaranty. We have never seen a case where such a thing has been upheld. All courts hold that damages cannot be stipulated at all in collateral agreements. To permit damages to be stipulated in a guaranty contract is to license gambling. A guaranty is always penal and recovery is always limited to the damages actually sustained.

It is one thing to say that you can stipulate damages with the person who has to perform the contract and quite another thing to say you can do so with a stranger. The Associated Oil Company might do so because it was obligated to do the act and defendant in error might do so because it was entitled to performance, but as to an outsider like plaintiff in error, the performance or non-performance of the contract is a mere arbitrary event over which he has no control.

We respectfully submit that under well settled principles of law the contract here sued upon provides for a penalty and not for liquidated damages. Not only the nature of the provision but the character of the contract compels this construction.

---

## VI. CONCLUSION.

The requirements of substantial justice in this case are easily perceptible in the record. Defendant in error, with mock seriousness, wails that it paid dearly for this contract and is entitled to the \$10,000.00.

But defendant in error did not dismiss its lawsuit in consideration of \$10,000.00. It dismissed it in consideration of a secondary obligation on the part of plaintiff in error—an obligation which it was contemplated and intended by the parties should be discharged by the mere performance of its contract on the part of the Associated Oil Company. De-

fendant in error well knew and fully appreciated that when the Associated performed its contract, plaintiff in error was to be discharged without the payment of a single solitary cent. To say that defendant in error dismissed its suit for \$10,000.00 and that now we will not pay the money is not a fair statement of what this record shows. Defendant in error dismissed its suit in exchange for what it hoped was a valuable piece of oil land, which would be tested without a cent of cost to it by a responsible party, and for a secondary obligation, well knowing its collateral character and that plaintiff in error would in all probability be discharged without the payment of the penalty.

Therefore, upon the record in this case, defendant in error has already received in full the very utmost which it bargained for. As learned counsel points out in his brief (page 14) the entire object of the contract was to insure that the Associated Oil Company would perform its contract and learned counsel himself concedes that the Associated Oil Company did not default.

Defendant in error was anxious and willing to dismiss its lawsuit in exchange for a gamble on a piece of oil land. It did not ask plaintiff in error for any money but only to stand behind the Associated Oil Company. Defendant in error received its oil land; the Associated did its best to perform its contract and defendant in error had its gamble and lost. That the land has been demonstrated to be

of no value for oil gives the motive but not a cause for mulcting plaintiff in error of \$10,000.00.

Plaintiff in error has already concluded its argument on the law as we understand it, but in so far as mere abstract principles of fairness and justice may have a place in the determination hereof, we respectfully submit that defendant in error has assumed an unconscionable position and is urging a claim of great unfairness.

Respectfully submitted,

A. L. WEIL,

FORREST A. COBB,

*Attorneys for Plaintiff in Error.*

HARRIS F. SHAW,

*Of Counsel.*

Dated, San Francisco,

July 18, 1923.





No. 3994

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

H. ALLEN RISPIN,

*Plaintiff in Error,*

VS.

THE MIDNIGHT OIL COMPANY

(a corporation),

*Defendant in Error.*

---

PETITION FOR A REHEARING ON BEHALF OF  
DEFENDANT IN ERROR.

---

DANA, BLOUNT & SILVERSTEIN,

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*Attorneys for Defendant in Error  
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## PETITION FOR A REHEARING ON BEHALF OF DEFENDANT IN ERROR.

*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

Application and petition of defendant in error for a rehearing in the above entitled action respectfully shows:

That judgment was pronounced in said cause by the United States Circuit Court of Appeals for the Ninth Circuit on the 6th day of August, 1923, reversing the judgment of the District Court of the United States in favor of defendant in error and against plaintiff in error.



That the judgment pronounced by this honorable Court is erroneous in this:

FIRST: That the contract in suit between plaintiff in error and defendant in error is not a contract of guaranty.

SECOND: That defendant in error was under no obligation to deliver the possession of the real property in question to Associated Oil Company and therefore a failure on the part of defendant in error to deliver said possession did not put defendant in error in default.

THIRD: The allegation in the answer of plaintiff in error that defendant in error suffered no actual damage by the failure to drill the oil well, as agreed, presented no issue as the contract in suit showed upon its face that it was a proper case for the parties to stipulate the damages which would result from a breach.

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### Guaranty?

By the contract in suit plaintiff in error agreed that the Associated Oil Company would drill the oil well in question and that he would pay the sum of Ten Thousand Dollars as liquidated damages if the Associated Oil Company *for any cause* failed to drill the said oil well, as agreed. The Associated Oil Company failed to drill the well. Plaintiff in error in his answer alleges A CAUSE for said

failure, namely, BECAUSE defendant in error failed to place the Associated Oil Company in possession of the property to be drilled. This Honorable Court holds THIS CAUSE sufficient to relieve plaintiff in error from his positive agreement to pay the stipulated sum. In other words the parties to the contract agreed that NO CAUSE would excuse plaintiff in error from his obligation to pay the stipulated sum if the Associated Oil Company failed to drill the well. This Honorable Court by construction changes the contract actually made by the parties to read in effect that NO CAUSE will excuse plaintiff in error from paying the stipulated sum EXCEPT FAILURE OF DEFENDANT IN ERROR TO PLACE THE ASSOCIATED OIL COMPANY IN POSSESSION OF THE PROPERTY, EXCEPT FAILURE OF THE HOPEWELL OIL COMPANY TO PLACE THE ASSOCIATED OIL COMPANY IN POSSESSION OF THE PROPERTY AND EXCEPT ALL THE OTHER CAUSES WHICH WILL RELIEVE A GUARANTOR FROM HIS OBLIGATION UNDER A GUARANTY.

If the contract in suit is a guaranty of the operating contract between the Associated Oil Company and the Hopewell Oil Company, as held by this Honorable Court, failure of the Hopewell Oil Company to place the Associated Oil Company in possession of the property to be drilled would release the guarantor, for by the terms of said operating contract the Hopewell Oil Company agreed to place the Associated Oil Company in possession; but attention is invited to the fact that the terms

of the operating contract *imposed no obligation or duty on defendant in error to place the Associated Oil Company in possession* for defendant in error was not a party to the said operating contract, nor was it even mentioned or referred to therein. It follows that even granting that the contract in suit was one of guaranty a failure on the part of defendant in error to perform the terms of the contract guaranteed would not release the guarantor.

But defendant in error does not grant that the contract in suit is one of guaranty, but on the contrary contends that it is an independent agreement and a primary obligation. If the contract in suit is a guaranty the guarantor would be relieved from all liability if the Hopewell Oil Company extended the time for the Associated Oil Company to drill the well. Yet the contract in suit expressly provides that plaintiff in error must pay the stipulated sum if the Associated Oil Company FOR ANY CAUSE fails to drill the well within the time agreed. If the contract in suit is a guaranty the guarantor would be released if the Hopewell Oil Company in any manner materially altered the terms of its operating contract with the Associated Oil Company; yet the contract in suit expressly provides that plaintiff in error must pay the stipulated sum if the Associated Oil Company FOR ANY CAUSE fails to drill the well within the time agreed. If the contract in suit is a guaranty the guarantor

would be released under certain circumstances if the operating contract guaranteed was illegal or void; yet the contract in suit expressly provides that plaintiff in error must pay the stipulated sum if the Associated Oil Company FOR ANY CAUSE fails to drill the well within the time agreed. Defendant in error submits that it readily appears from the foregoing analysis that the express terms of the said contract between plaintiff in error and defendant in error are positively inconsistent with the claim that the said contract is a contract of guaranty. Defendant in error further contends that to even plausibly contend that the contract in suit is a guaranty the provision that plaintiff in error was to pay the stipulated sum if FOR ANY CAUSE the Associated Oil Company failed to drill the well must be stricken out of the contract, or entirely disregarded.

“There can only be a contract of guaranty where there is some principal or substantive liability to which it is collateral. The chief characteristic of a guaranty being that it is collateral to some other contract or duty.”  
20 Cyc., page 1397.

The contract in suit is not collateral. It does not purport to guarantee the performance of some principal or substantive liability. It does not purport to guarantee the performance of some other contract or duty. By its terms plaintiff in error does not agree “or guarantee” that the Associated Oil Company will perform its contract with the



Hopewell Oil Company. By its terms it does not agree or guarantee that the Associated Oil Company will perform any obligation which it had to the Hopewell Oil Company. It is true, the Associated Oil Company was bound, *upon the conditions set forth in the operating contract*, to drill the oil well in question, but plaintiff in error agreed with defendant in error that the Associated Oil Company would drill the well *without any conditions attached to the obligation*. In other words plaintiff in error did not agree with defendant in error that the Associated Oil Company would drill the well provided that the Hopewell Oil Company lived up to its contract with the Associated Oil Company. Yet so far as the obligation of the Associated Oil Company to the Hopewell Oil Company is concerned that obligation is conditioned upon the Hopewell Oil Company placing the Associated Oil Company in possession of the property to be drilled and performing the other terms and conditions of the operating contract on the part of the Hopewell Oil Company to be performed. If plaintiff in error had agreed with defendant in error that the Associated Oil Company would perform its contract with the Hopewell Oil Company or would perform some duty or obligation which it had to the Hopewell Oil Company the said agreement would have been collateral to that contract or obligation and hence a guaranty, but defendant in error merely agreed that the Associated Oil Company would drill the well in question with no

reference to any contract or obligation of the Associated Oil Company to drill the well. If the parties had intended that plaintiff in error was to become obligated only to the extent that the Associated Oil Company was obligated under its contract with the Hopewell Oil Company it would have been a simple matter to employ words to indicate such intention. The outstanding fact in this connection is that no such words were employed. The words actually employed are consistent only with an independent agreement on the part of plaintiff in error that the Associated Oil Company would drill the well in question with no excuses for non-performance. The fact that the word "guaranty" was used is not at all conclusive that the parties intended that their contract was to be a guaranty. There are many cases in which the Courts have construed contracts in which the word guaranty was used to be independent and primary obligations.

5 Cyc. 1398;

*Kernochan v. Murray*, 111 N. Y. 306;

*Manning v. Alger*, 78 Iowa 185;

*Sherman v. Roberts*, 1 Grant (Pa.).

Whether the contract in review is a collateral or independent obligation must be determined by an examination of the entire contract.

5 Cyc. 1398.

**Obligation, if Any, of Midnight Oil Company.**

Plaintiff in error alleged in paragraph III of his answer that on May 12, 1919, the Hopewell Oil Company assigned to the Midnight Oil Company, defendant in error herein,

“All of the *royalties and benefits* accruing or thereafter accruing to said Hopewell Oil Company from said Associated Oil Company by virtue of said contract referred to in paragraph II above by an instrument in writing, a copy of which is attached hereto and marked Exhibit C and is hereby made a part hereof.”

Referring to Exhibit C it appears that the foregoing allegation is true, namely: That the Hopewell Oil Company did assign the *royalties and benefits* accruing from said contract to the Midnight Oil Company. It is particularly important to note in this connection that the Midnight Oil Company by said assignment did not agree to assume any of the obligations of the Hopewell Oil Company imposed upon the Hopewell Oil Company by its said contract with the Associated Oil Company. In other words the Midnight Oil Company, defendant in error herein, did not expressly agree by said assignment to place the Associated Oil Company in possession of the property in question for the purpose of drilling thereon or at all. If it did not expressly agree to place the Associated Oil Company in possession was there an implied agreement to do so? Defendant in error submits that there was no such implied agreement. The Hopewell Oil Company merely assigned to defendant in error the royalties and benefits accruing to it by virtue

of its contract with the Associated Oil Company. An assignment of royalties and benefits to accrue from a contract does not impose upon the assignee the burden of performing the obligations of said contract.

*5 Corpus Juris*, pp. 976-977;

*Levalle v. U. S. Gordon*, 15 Mont. 515;

*Gammel Book Co. v. Paine*, 75 Nebr. 683;

*Suydam v. Duton*, 84 Hun. 506;

*National Surety Co. v. Macy*, 43 Ind. A. 16,  
86 M. E. 862.

The said assignment to the defendant in error was expressly made subject to the said operating contract between the Hopewell Oil Company and the Associated Oil Company. Defendant in error contends that the legal effect of such provision in the assignment does not impose upon the assignee the obligations of the assignor, or, in other words, that defendant in error, as assignee of the royalties and benefits accruing under the so-called operating contract, did not become obligated to perform the conditions of said contract on the part of the assignor, namely the Hopewell Oil Company, to be performed.

*Consolidated Coal Co. v. Peers* (Ill.) 38 L.  
R. A. 624;

*Patton v. Adkins*, 42 Ark. 197;

*Commercial Bank of Madera v. Redfield*, 122  
Cal. 405;

*King v. Israel*, 43 N. Y. Supp. 306;

*Levallé v. Gordon*, 15 Mont. 515.



It is significant that the said assignment in express terms imposes upon defendant in error herein the obligation of performing the terms and conditions of *the lease between the Hopewell Oil Company and the Western States Oil & Land Company*, but does not in express terms impose upon defendant in error the obligations of performing the terms and conditions of the operating contract between the Hopewell Oil Company and the Associated Oil Company. The language of the assignment is as follows:

“To have and to hold by the said Midnight Oil Company, its successors and assigns, subject however to all the terms, conditions, agreements, covenants and royalties expressed in said *lease* which said TERMS, CONDITIONS, AGREEMENTS and ROYALTIES the Midnight Oil Company agrees to KEEP, PERFORM AND PAY SO FAR AS IT RELATES TO THE ABOVE DESCRIBED LAND ASSIGNED TO IT AND SUBJECT TO SAID OPERATING CONTRACT AS TO ALL OF THE TERMS, CONDITIONS, AGREEMENTS AND COVENANTS therein contained.”

It seems only fair to assume that if the parties to said assignment had intended that the Midnight Oil Company was to be obligated to perform the terms and conditions of the operating contract as well as the terms and conditions of the lease they would have so provided.

The lease between the Western States Oil & Land Company and the Hopewell Oil Company of course made no reference to the said operating contract. It follows therefrom that an agreement on the part of the Midnight Oil Company to perform

the terms and conditions of *said lease* did not impose upon the Midnight Oil Company the obligation of performing the terms and conditions of the *said operating contract*. If defendant in error is correct in the position that it has taken that the assignment to it by the Hopewell Oil Company of the *benefits and royalties* accruing from the operating contract and the assignment of *the lease* between the Western States Oil & Land Company and the Hopewell Oil Company and the agreement to perform terms and conditions of said lease did not impose upon defendant in error the obligation of placing the Associated Oil Company in possession of the lands in question for the purpose of drilling thereon, it follows that defendant in error having no obligation to do so was not in default when it failed to place the Associated Oil Company in possession of the said real property. However in any event the said operating contract was not a part of the contract between plaintiff in error and defendant in error. It follows that whether or not, as between the Associated Oil Company and defendant in error, defendant in error was obligated to place the Associated Oil Company in possession of the property, plaintiff in error, by virtue of his said contract with defendant in error, would have no right to rely upon the failure of defendant in error so to do. The contract between plaintiff in error and defendant in error is a primary and independent contract and unless defendant in error failed to perform its terms on his part to be per-

formed plaintiff in error has no right to complain. Even though defendant in error had expressly agreed to perform the terms of the operating contract, said express agreement would not thereby become the contract the performance of which plaintiff in error is claimed to have guaranteed. How then would a breach of its agreement release plaintiff in error who is claimed to have guaranteed the performance of another contract, namely, the operating contract.

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### **Liquidated Damages.**

This Honorable Court in its decision herein lays down the rule that granting that the contract in suit must be read as for liquidated damages it will not be enforced if it appears that do damage whatever has been sustained. If this rule is to prevail what becomes of the great weight of authority which holds that where the parties in their contract have properly provided for liquidated damages the question of actual damage is not an issue? In the case of *Woods v. Niagara Falls Paper Company*, 121 Fed. 818, defendant attempted to prove that plaintiff sustained no actual damage. The trial Court excluded all such evidence, which ruling was sustained upon appeal. The Wood case was fully supported by

*Sun Publishing Company v. Moore*, 163 U. S. 682;

*Bosch Magneto Company v. Rushmore*, 255  
 Fed. 465;  
*Gibson v. Oliver*, 25 Atl. Rep. 961;  
*Springer v. Citizens Gas Company*, 22 Atl.  
 Rep. 986;  
 17 Corpus Juris, 965.

The above mentioned rule laid down by this Honorable Court simply means the question of actual damage is an issue in every case whether the case be one to recover a penalty or liquidated damages. Evidence that no damage had been sustained would be material in all such cases where defendant had alleged or put in issue the question of actual damage.

The case of *Northwestern Fixture Company v. Kilborne*, 158 Fed. 256, we respectfully submit does not uphold the rule laid down by this Honorable Court in its decision herein, as in said case the Court actually construed the contract in review to provide for a penalty and not liquidated damages. Said Court did not hold that the contract in review was a contract properly providing for liquidated damages and that the question of actual damage was not an issue. In the case of *The Columbia*, 997 Fed. 661, the decision was based upon the meaning of the word demurrage. It was not a case involving a question of liquidated damages.

We respectfully submit that the great weight of authority lays down the following rule in respect



to liquidated damages and that such rule should be followed in the case at bar, namely: That it shall first be determined by the Court whether or not the nature of the contract is such that it was proper for the parties to stipulate their damages; that if this question be determined in the affirmative that the question of actual damage is irrelevant as it is not an issue and can not be made such by the mere allegation that no actual damage has been sustained.

Wherefore defendant in error prays that its application for a rehearing be granted.

Dated, San Francisco,  
September 1, 1923.

DANA, BLOUNT & SILVERSTEIN,  
DUDLEY D. SALES,  
*Attorneys for Defendant in Error  
and Petitioner.*

## CERTIFICATE OF COUNSEL.

I do hereby certify that I am of counsel for defendant in error and petitioner in the above entitled action and that in my judgment the foregoing petition for a rehearing is well-founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,  
September 1, 1923.

DUDLEY D. SALES,  
*Attorney for Defendant in Error  
and Petitioner.*



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

HENRY S. FLEMING,

Appellant,

vs.

MONTANA COAL & IRON COMPANY, a Corporation,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court  
for the District of Montana.

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FILED

APR 20 1933

F. B. MONTGOMERY  
CLERK





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**Names and Addresses of Solicitors of Record.**

GEORGE F. SHELTON, Esq., Butte, Montana,  
Solicitor for Plaintiff and Appellant.

Messrs. JOHNSTON, COLEMAN & JOHNSTON,  
Billings, Montana,  
Solicitors for Defendant and Appellee.

[1\*]

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In the District Court of the United States in and  
for the District of Montana.

IN EQUITY—No. 250.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY, a Corpo-  
ration,

Defendant.

BE IT REMEMBERED, that on November 28th,  
1922, the plaintiff filed his bill of complaint herein,  
in the words and figures following, to wit: [2]

In the District Court of the United States for the  
District of Montana, Butte Division.

IN EQUITY—No. —.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY, a Corpo-  
ration,

Defendant.

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\*Page-number appearing at foot of page of original certified Transcript of Record.

**Bill of Complaint.**

To the Honorable the Judge of the District Court  
of the United States in and for the District of  
Montana.

The plaintiff above named, Henry S. Fleming, a citizen and resident of the State of New York, suing on behalf of himself and all other persons similarly situated, who may come in and join the plaintiff in the prosecution of this suit, and share in the expense thereof, by Folger & Rockwood and George F. Shelton, his attorneys, brings this, his Bill of Complaint, against Montana Coal & Iron Company, a corporation, organized and existing under and by virtue of the laws of the State of Montana and a citizen of said state.

And thereupon the plaintiff complains and alleges:

FIRST: That the plaintiff Henry S. Fleming, at all of the times hereinafter named was and still is a citizen of the State of New York and a resident thereof.

SECOND: That the defendant, Montana Coal & Iron Company, was at all of the times hereinafter named and still is, a corporation, organized and existing under and by virtue of the laws of the State of Montana and doing business in said State and a citizen and resident thereof.

THIRD: That the plaintiff Henry S. Fleming, at all of the times herein mentioned has been and still is the owner and holder of four certain bonds of the defendant company, each given to secure the

sum of one thousand dollars (\$1,000.00) with interest according to its terms, the aggregating amount of said bonds, owned by the said plaintiff is the sum of four thousand dollars (\$4,000.00) par value with interest as aforesaid. [3]

FOURTH: That the bonds of the defendant company so held by this plaintiff as aforesaid were issued under and by virtue of the terms of a certain mortgage, made by the defendant company to Empire Trust Company, as Trustee, bearing date the 2d day of January, 1912, and thereafter duly recorded in the office of the Clerk and recorder of the County of Carbon, State of Montana, on the — day of —, 1912.

FIFTH: That the aforesaid mortgage contained a provision that the real estate covered by the same should be held by the Trustee:

“IN TRUST, NEVERTHELESS, for the equal *pro rata* benefit and security of all the holders of any of the above mentioned bonds and coupons at what period soever the same may be issued, without any preference or priority of one bond over another, except as hereinafter mentioned, and for the uses and purposes, and on the conditions, covenants and restrictions herein declared and expressed.”

SIXTH: That the aforesaid mortgage creates a sinking fund for the benefit and security of the bonds issued under the Indenture of Mortgage, to be maintained by the setting aside of a specific sum of money for each ton of coal and provides further that when the sums of money so set aside

should aggregate a stated amount, the Trustee is required to advertise for written proposals to sell to it outstanding bonds to be purchased with such moneys and if no bonds are then offered or the purchase price of those offered is in excess of a stated price or does not consume the whole amount in such sinking fund then the Trustee is required to redeem with such sinking fund moneys at the redemption price such bonds as are determined by lot.

SEVENTH: Such indenture of mortgage likewise provided (paragraph 29) as follows:

“IT IS FURTHER COVENANTED, PROMISED AND AGREED THAT AT ANY TIME HEREAFTER and prior to the time when the principal sum secured by the said bonds shall become due, the Company may make a call for the redemption of the whole or any part of said issue of bonds then outstanding in the manner and with the effect hereinafter stated.

The bonds to be redeemed under such call shall be determined by lot by placing pieces of paper of equal size and appearance and equal in number to the bonds outstanding, with numbers on them respectively corresponding to the numbers of the respective bonds outstanding, in a wheel or box, and after properly and thoroughly commingling the same, such pieces of paper shall be drawn out, one at a time by a person appointed for that purpose by resolution of the Board of Trustees of the Company, until sufficient amount of the bonds



represented thereby shall have been drawn to equal the amount at their par value of the bonds called for redemption, with accrued interest to date of call, plus the amount of premium required to be paid upon the same. The Company shall thereupon give notice by public advertisement in one newspaper published in the City of Billings, Montana, and one newspaper published in the City of New York, daily for one week, the last publication [4] to be finished at least thirty days before the date fixed for said redemption, and also that said bonds have under the provisions of the mortgage been determined by lot as bonds to be redeemed by the Company, at the time and place mentioned in the said notice. Said notice so published shall further state that the bonds are called for redemption at a place in the City of New York therein mentioned, at a date and hour therein mentioned, not less than thirty days nor more than two months from the date of the last publication, at which time and place said company shall redeem said bonds by paying the principal and accrued interest due thereon to date of actual redemption, plus a five (5) per cent premium on the amount of the par value of principal thereof. \* \* \*

EIGHTH: That heretofore and prior to the commencement of this action the defendant corporation through its officers and trustees, expended large sums of money of the defendant company in

the purchase of bonds issued under and pursuant to the aforesaid Indenture of Mortgage, which sums amount to at least one hundred thirty-eight *thousand* (\$138,000.00); that such moneys were not placed to the credit of the sinking fund and disbursed by the trustee herein according to the terms of said Indenture of Mortgage, but were used by the officers and trustees of, and by the defendant company in the purchase of bonds at private sale, without advertisement for bids, and without in other ways complying with the terms of said Indenture of Mortgage; that no call has been made by the defendant company for the redemption of the whole or any part of such issue of bonds outstanding and the bonds so purchased by the defendant company, its officers and trustees, have been, in fact, cancelled and were purchased for the sole purpose of redemption thereof.

NINTH: That as a holder of four of the bonds issued under such mortgage the plaintiff above named was and is entitled to an opportunity to have his bonds selected for redemption at the premium of five per cent as provided in said mortgage; and by reason of the acts of the company and its officers and trustees in authorizing the purchase of and in purchasing for redemption bonds selected in a way other than as provided in said mortgage this plaintiff has been damaged and will continue to suffer irreparable damage if such action is permitted to continue on the part of the defendant company, its officers and trustees.

TENTH: That the defendant company, its officers and trustees have now appropriated to the purchase of bonds in the unlawful and improper method hereinabove referred to, further large sums of money which the defendant company, its officers and trustees are about to illegally and improperly expend, and unless restrained from such further acts this plaintiff will suffer additional irreparable injury. [5]

ELEVENTH: That the defendant company, its officers and trustees, threaten to further appropriate and use for the purchase of bonds in the unlawful and improper method hereinbefore referred to, further large sums of money and the said defendant Company and its officers and trustees are about to illegally and improperly spend additional large amounts of money in unlawful and improper methods above referred to and thereby the injury and damage to the plaintiff, thus threatened will become irreparable; that the plaintiff has no plain speedy or adequate remedy at law, all of which acts and doings are contrary to equity and good conscience and tend to the manifest injury of the plaintiff in the premises.

That the matter in controversy in this suit exceeds exclusive of interest and costs the sum or value of three thousand dollars (\$3,000.00).

Forasmuch as the plaintiff can have no adequate relief, except in this court, and to the end, therefore, that the defendant, Montana Coal & Iron Company, may, if they can, show why the plaintiff should not have the relief hereby prayed, and may

make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

And that the defendant may be decreed to account for and pay over the profits thus unlawfully derived from the violation of the plaintiff's rights and be restrained from any further violation of said rights, plaintiff prays that your Honor may grant a writ of injunction, issuing out of and under the seal of this Honorable Court, perpetually enjoining and restraining the said defendant company, its officers, trustees and agents and employees, from using the funds of the corporation in the purchase of outstanding bonds, issued under the Indenture of Trust and Mortgage made and executed by the defendant to Empire Trust Company, under date of January 2d, 1912, except according to the terms, conditions and provisions set forth and contained in said mortgage, together with the costs and disbursements of this action. [6]

And that your Honor upon the rendering of the decree above prayed may assess or cause to be assessed, in addition to the profits to be accounted for by the defendant as aforesaid, the damage plaintiff has sustained by reason of such violation of his rights as aforesaid.

And plaintiff further prays that a provisional or preliminary injunction be issued restraining the



said defendant from any further violation of the rights of said plaintiff, pending this cause and for such other and further relief as the Equity of the case may require and to your Honor may seem meet.

May it please your Honor to grant unto the plaintiff, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said Montana Coal & Iron Company commanding it on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

GEORGE F. SHELTON,  
FOLGER & ROCKWOOD,

Attorneys for Plaintiff and of Counsel. [7]

United States of America,  
State of New York,  
County of New York,—ss.

Henry S. Fleming, being first duly sworn, deposes and says, that he is the plaintiff above named; that he has read the foregoing complaint and knows the contents thereof, and that as to the matters and things therein set forth, the same is true of his own knowledge.

HENRY S. FLEMING.

Subscribed and sworn to before me this 23d day of November, 1922.

CATHERINE TAGUE,  
Notary Public.

My commission expires March 30, 1922. [8]



No. 26631, Series B.—Form 1.

State of New York,  
County of New York,—ss.

I, James A. Donegan, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, **DO HEREBY CERTIFY**, That Catherine Tague, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a notary public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 24th day of November, 1922.

[Seal]

JAMES A. DONEGAN,

Clerk.

Complaint. Filed Nov. 28, 1922. C. R. Garlow,  
Clerk. [9]

THEREAFTER, on December 27, 1922, plaintiff filed herein his motion for injunction *pendente lite*, with affidavit of service, which motion and affidavit is in the words and figures following, to wit: [10]

In the District Court of the United States in and  
for the District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY,

Defendant.

**Motion for Injunction Pendente Lite.**

To Johnston, Coleman & Johnston, Attorneys for  
Defendant.

You will please take notice that the plaintiff on the 4th day of January, 1923, at the hour of 10 o'clock A. M., on said date, at the courtroom in the Federal Building, at Helena, Montana, will apply to the Court for an injunction *pendente lite*, in accordance with the prayer of the complaint.

The application will be made upon the verified complaint of the plaintiff and upon the affidavit of Henry S. Fleming, a copy of which is herewith served upon you.

GEORGE F. SHELTON,

FOLGER & ROCKWOOD,

Attorneys for Plaintiff. [11]

In the District Court of the United States in and  
for the District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY,

Defendant.

**Notice of Service of Affidavit.**

State of Montana,  
County of Silver Bow,—ss.

George F. Shelton, being first duly sworn, deposes and says that he is a citizen of the State of Montana, and a resident of Silver Bow County, Montana, over 21 years of age; that he served the attached notice and the affidavit of Henry S. Fleming, also hereto attached, on Johnston, Coleman & Johnston, attorneys for the defendant, on the 27th day of December, 1922, by depositing in the United States Postoffice, at Butte, Montana, on said 27th day of December, 1922, a sealed envelope, which said sealed envelope contained a copy of said notice and of said affidavit, and had affixed thereto the requisite amount of United States postage stamps, to entitle the same to be carried by the United States Mails, which said envelope was addressed to Johnston, Coleman & Johnston, Billings, Montana, and further affiant sayeth not.

GEORGE F. SHELTON.

Subscribed and sworn to before me this 27th day of December, 1922.

[Seal]

L. D. BARRY,

Notary Public for the State of Montana residing at Butte, Montana.

My commission expires Dec. 8, 1925.

Filed December 27, 1922. C. R. Garlow, Clerk.

[12]

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THEREAFTER, on December 27, 1922, the plaintiff Henry S. Fleming filed his affidavit herein on application for a preliminary injunction, which affidavit is in the words and figures following, to wit: [13]

In the District Court of the United States in and for the District of Montana, Butte Division.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY, a Corporation,

Defendant.

**Affidavit of Henry S. Fleming on Application for Preliminary Injunction.**

United States of America,  
State of New York,  
County of New York,—ss.

Henry S. Fleming, being first duly sworn, deposes and says:

That he is the plaintiff named in the above-



entitled suit, that he is a citizen and resident of the State of New York, and is of the age of 59 years; that he is the owner and holder of four certain bonds of the defendant company, each given to secure the sum of one thousand dollars (\$1,000.00), with interest according to its terms; that the said bonds are numbered as follows:

537-538-539-540

That he acquired said bonds on the 7th day of October, 1913, and has been owner and holder of the same from the said date of said acquisition; that said bonds so owned and held by affiant, were issued under the terms of a certain mortgage, made by the defendant company to Empire Trust Company, as trustee; bearing date of the 2d day of January, 1912, and thereafter duly recorded in the office of the Clerk & Recorder of the County of Carbon, State of Montana, on the 11th day of November, 1912, in Book 15, Page 490.

That the said mortgage contained a provision that the real estate covered by the same, should be held by the Trustee

“IN TRUST NEVERTHELESS, for the equal *pro rata* benefit and security of all the holders of any of the above mentioned bonds and coupons at what period soever the same may be issued, without any preference or priority of one bond over another, except as hereinafter mentioned, and [14] for the uses and purposes and on the conditions, covenants and restrictions herein declared and expressed.”



That said mortgage contained a clause and provision as follows, to wit:

The Company hereby creates and at all times will maintain a sinking fund for the benefit and security of the bonds issued and to be issued under this indenture, by paying to the Trustee within thirty days after the second day of July and January of each year, beginning with the second day of January, 1914, and thereafter, and until all the bonds issued and to be issued under this indenture are fully paid and canceled, an amount which for and during the period of three years ending January 2d, 1917, shall equal the sum of two cents, and which thereafter for and during the period of ten years ending January 2d, 1927, shall equal the sum of three cents, and which thereafter for and during the period of ten years ending January 2d, 1937, shall equal the sum of four cents, and which thereafter and so long as any of the bonds hereby secured may be outstanding, shall equal the sum of five cents, in each instance for and in respect of each and every ton of two thousand two hundred and forty pounds of run of mine coal mined or taken during the preceding period of six months ending on each second day of January or July (as the case may be), from any of the property at the time of such mining or taking subject to this indenture or provided or agreed to be subject or subjected thereto, whether the property from which such coal is mined or taken is held in fee or under lease by the Coal Company, or any subsidiary company or by others under leases or other instruments heretofore

or hereafter executed by either of them or in any other manner, and by whomsoever said coal may be mined or taken. All payments into the sinking fund in this article 12 provided for shall be disposed of and applied solely as in this article of this indenture specified and provided.

Any and all funds at any time paid into or becoming a part of the sinking fund mentioned in this article 12 of this indenture shall by the Trustee, upon receipt thereof, be applied as follows:

Whenever the amount paid into or then in the said sinking fund shall amount to \$10,000 or more the Trustee shall, by notice to be [15] published once a week for two successive weeks in a daily newspaper of general circulation, published in the borough of Manhattan in the City of New York, and in the City of Billings, State of Montana, advertise for written proposals to sell to it bonds secured hereby and then outstanding, and the Trustee to the extent of the funds then in its hands available therefor, shall purchase the bonds offered to it at the lowest price asked therefor, such purchase to be made at the office of the Trustee in the City of New York, upon surrender of the bonds with all unpaid coupons pertaining thereto, on the semi-annual interest date next following such publication, and the Trustee shall give to the owner or owners of the bonds whose proposals may be accepted such notice of such acceptance as to the Trustee may seem reasonable. In the event that two or more proposals are for the sale of bonds at identical amounts, being lower than the amounts asked in the

other tenders received by the Trustee, such proposals shall be accepted in *pro rata* proportions; provided however that no purchase shall be made by the Trustee at a rate exceeding one hundred and five per cent of the principal of the bonds with all the interest accrued upon the said principal and unpaid at the time fixed for the consummation of such purchase. If upon any such advertisement being made, no proposals to sell bonds at or below the price aforesaid shall be made, or if such proposals made shall not be sufficient to exhaust the moneys held on deposit as aforesaid, then the amount of said funds not required for the purchase of bonds proposed to be sold at or below the price aforesaid shall be applied subject to the divisions of the bonds and in the manner in this article specified, to the redemption of bonds secured hereby and then outstanding at the rate of one hundred and five per centum of the principal thereof with all interest accrued upon the said principal and unpaid at the time fixed for such redemption; and to the extent of said funds applicable to redemption the Trustee shall draw or cause to be drawn by lot from a closed box containing all of the numbers of the whole number of the bonds outstanding under this indenture at the date of such drawing the serial numbers of the bonds to be redeemed. In making any such drawing the serial numbers of the then outstanding coupon bonds shall be collectively used.

[16]

The moneys of the sinking fund shall be used by the Trustee in the purchase of bonds secured hereby

at not exceeding 105 per centum of their par value and accrued interest, or in the redemption of bonds at said maximum price.

All bonds purchased or redeemed, as in this article provided, shall, with the coupons thereto attached, be cancelled by the Trustee and destroyed, excepting in so far as retention of the same as vouchers may be deemed expedient. And if destroyed a partial satisfaction piece shall be executed and delivered to the Company up to the amount of the debt so paid off.

Which said mortgage also contained the following provisions:

It is further covenanted, promised and agreed that at any time hereafter and prior to the time when the principal sum secured by the said bonds shall become due, the Company may make a call for the redemption of the whole or any part of said issue of bonds then outstanding in the manner and with the effect hereinafter stated.

The bonds to be redeemed under such call shall be determined by lot by placing pieces of paper of equal size and appearance and equal in number to the bonds outstanding, with numbers on them respectively corresponding to the numbers of the respective bonds outstanding, in a wheel or box, and after properly and thoroughly commingling the same, such pieces of paper shall be drawn out, one at a time, by a person appointed for that purpose by resolution of the Board of Trustees of the Company, until sufficient amount of the bonds represented thereby shall have been drawn to equal the



amount at their par value of the bonds called for redemption, with accrued interest to date of call, plus the amount of premium required to be paid upon the same. The Company shall thereupon give notice by public advertisement in one newspaper published in the City of Billings, Montana, and one *news* published in the City of New York, daily for one week, the last publication to be finished at least thirty days before the date fixed for said redemption, and any such advertisement shall state the number and par value of the bonds so drawn for redemption, and also that said bonds have under the provisions of the mortgage been determined by lot as bonds to be redeemed by the Company, at the time and place [17] mentioned in the said notice. Said notice so published shall further state that the said bonds are called for redemption at a place in the City of New York therein mentioned, at a date and hour therein mentioned, not less than thirty days nor more than two months from the date of the last publication, at which time and place said Company shall redeem said bonds by paying the principal and accrued interest due thereon to date of actual redemption, plus a five (5) per cent premium on the amount of the par value of principal thereof.

In case any of said bonds, so called, shall be registered, a notice of a similar nature shall be mailed to the registered owner thereof to his last address left with the Company; always provided, that such notice shall be mailed not less than one



month prior to the time mentioned therein for the redemption of said bonds.

The publication of such notice shall be conclusive proof as between the parties of the receipt of said notice of call for redemption and in like manner the deposit of said notice in the postoffice, properly inclosed in a post paid wrapper, addressed to the known address given by the said registered bondholder to the Company, shall be conclusive evidence as between the parties of the receipt of such notice, and the affidavit of the printer as to publication and (or) of the person or persons so depositing the said notice in any postoffice shall, as between the parties, constitute *prima facie* sufficient and satisfactory proof of the actual publication (and) or mailing, as the case may be, of the said notice as required by this covenant, and of the receipt of the same, so as to fix and determine the rights of the parties hereunder.

From and after the date mentioned for redemption and payment in such notice of call, in case such bonds so called are not presented for payment, or being presented are paid, interest upon the bonds so called shall cease and the coupons attached or belonging to the same growing due thereafter shall be and become cancelled, null and void. Upon the presentation for payment of the bonds mentioned in the call, together with all coupons not yet paid thereon, the Company shall redeem the same by the payment of the principal and interest due thereon, together with a five (5) per cent premium on the amount of the par value of the principal sum se-

cured thereby, and in case any [18] of said bonds so called are not so presented, the Company may, at its option, forfeit the right of said bonds or bonds to be redeemed under said call, leaving them in the same position as though not yet called, or it may hold the amounts so set apart for its other redemption, or may invest the same in such securities as said Company in its absolute discretion and judgment may approve at the sole risk of and for the benefit of such bondholder or bondholders until the same shall be called for.

In case of the presentation of any bond or bonds from which the interest coupons not yet paid or any part of them have been detached, or are not presented with the bond to which they belong, the amount of such detached or unrepresented and unpaid coupon or coupons from such bond or bonds shall be deducted from the amount due and paid on the said bond or bonds at the time so fixed for redemption of the same by said publication or notice of call.

That heretofore and prior to the commencement of this action, the defendant corporation through its officers and trustees, expended large sums of money of the defendant company in the purchase of bonds issued under and pursuant to the aforesaid Indenture of Mortgage, which sums amount to at least one hundred thirty-eight *thousand* (\$138,000.00); that such moneys were not placed to the credit of the sinking fund and disbursed by the trustee herein according to the terms of said Indenture of Mortgage, but were used by the officers and trustees of, and by the defendant company in the purchase of

bonds at private sale, without advertisement for bids, and without in other ways complying with the terms of said Indenture of Mortgage; that no call has been made by the defendant company for the redemption of the whole or any part of such issue of bonds outstanding and the bonds so purchased by the defendant company, its officers and trustees, have been, in fact, cancelled and were purchased for the sole purpose of redemption thereof.

That affiant as the owner and holder of four of the bonds issued under such mortgage above named, was and is entitled to the privilege to have his bonds selected for redemption at a premium of five (5) per cent, as provided in the said mortgage, but that the said defendant company and its officers and trustees, in authorizing the purchase of, [19] and in purchasing for redemption, bonds selected in a way other than provided in said mortgage, have damaged this plaintiff and deprived him of his right in the premises.

That the said defendant company and its officers and trustees have heretofore from time to time, purchased and retired of the corporate bonds of the company amounts aggregating at par value one hundred thirty-eight thousand (\$138,000.00) Dollars; that the said bonds so purchased and retired by the said company and its officers were purchased and retired without the consent of affiant and in violation of and contrary to the provisions of the paragraphs of the said mortgage above quoted; that on the 21st day of October, 1920, at a meeting of the trustees of the said defendant company, a resolution was adopted as follows, to wit:

“RESOLVED, that at the time of the next payment of the sinking fund requirement to the Empire Trust Company of New York City, the general manager cause to be paid to said Trust Company the additional sum of twenty thousand dollars (\$20,000.00) and that he direct the Trust Company to use and disburse the same in the purchase and retirement of the outstanding bonds of this company at a price not exceeding the par value thereof.”

That on the 28th day of February, 1921, at a meeting of the Trustees of said defendant company, the following resolution was adopted, to wit:

“AND BE IT FURTHER RESOLVED, that the managing officers of the company be directed to set aside and to apply during the year 1921, to the purchase and retirement of the outstanding corporate bonds of the company, at a price not in excess of the par value thereof, an amount of money which, with the payments made into the sinking fund for such purpose, shall total in all the sum of Sixty Thousand dollars (\$60,000.00).”

And that on the 20th day of January, 1922, at a meeting of the trustees of said defendant company, the following resolution was adopted, to wit:

“BE IT FURTHER RESOLVED, that the Vice-President of the company be and he is hereby authorized and directed to apply not to exceed the sum of Thirty Thousand Dollars (\$30,000.00) to the purchase and retirement of the outstanding bonds of the company, offered at par or less, to the Empire Trust Company of New York City.”



That on the 13th day of June, 1922, at a meeting of the trustees of [20] said defendant company the following resolution was adopted, to wit:

“RESOLVED, that the President and Vice-President be and they hereby are requested and directed to continue the policy of expending, when to them it seems desirable to do so, sums of money approximately equal in amount to the sums distributed as dividends to stockholders in the purchase and retirement, if any, of the outstanding bonds of this company, providing the same may be acquired at par or less.”

And thereupon at said meeting on the 13th day of June, 1922, the vice-president reported to the Board of Directors that acting under the authority given to them by the stockholders and directors, the officers of the company had heretofore purchased and acquired and caused to be retired of the corporate bonds of the company, amounts aggregating \$138,000.00 in par value. A minute of such report being incorporated in the minutes of the meeting as follows:

“The Vice-President reported to the Board of Directors that acting under the authority given to them by the stockholders and directors, the officers of the company had heretofore purchased and acquired and caused to be retired of the corporate bonds of the company amounts aggregating \$138,000 in par value.”

Thereupon and at said meeting the following resolution was adopted:

“RESOLVED, that all and singular the acts of the officers of this company in purchasing and retiring its outstanding bonds as reported, by the Vice-President, be and the same hereby is ratified, approved of and confirmed.”

And affiant further says, that in the annual report of the President to the stockholders, which report was incorporated in the “minutes of the annual meeting” of the stockholders of said defendant corporation, held on the 13th of June, 1922, he made the following statement to the stockholders:

“Of the outstanding bonds of the company Forty-one Thousand Dollars (\$41,000.00), par value, were paid and retired during the year, leaving unpaid of said bonds Two Hundred Eighty-seven Thousand Five Hundred Dollars (\$287,500.00). We expect to have Fifty Thousand Dollars (\$50,000.00) available during the present year to be used in purchasing and retiring bonds, providing that the bonds may be purchased without paying any premium.” [21]

And which said statement was adopted and ratified at the meeting of the trustees held on said date.

That affiant has demanded of the said defendant corporation and of its officers that it rescind its illegal and unlawful action in the purchase of said bonds contrary to the provisions of the said mortgage and that it cease its unlawful conduct in connection therewith; that the said defendant corporation and its officers have neglected and refused to comply with the demand of the said affiant and have threatened and still threaten to continue said illegal

practices contrary to the rights of affiant as holder of said bonds against his will and to his irreparable damage in the premises.

And further affiant sayeth not.

HENRY S. FLEMING.

Subscribed and sworn to before me this 23d day of November, 1922.

[Seal]

CATHERINE TAGUE,  
Notary Public, New York Co.

Clerk's No. L.

New York Co. Register's No. 3043.

King's Co. Clerk's No. 3.

King's Co. Register's No. 3019.

My commission expires March 30, 1923.

No. 26636, Series B. (Form 1).

State of New York,

County of New York,—ss.

I, James A. Donegan, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a court of record, do hereby certify, that Catherine Tague, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition, or proof and acknowledgment, a notary public in and for such county, duly commissioned and sworn, and authorized by the laws of said state, to take depositions and to administer oaths to be used in my court of said State and for general purposes: and also to take acknowledgments and proofs of deeds, of conveyances for

land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 24 day of Nov. 1922.

[Seal]

JAMES A. DONEGAN,

Clerk.

Filed Dec. 27, 1922. C. R. Garlow, Clerk. [22]

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THEREAFTER, on January 4, 1923, a letter from defendant's counsel stating defendant would not resist the granting of preliminary injunction, was filed herein, being in the words and figures following, to wit: [23]

**Letter Dated December 26, 1922—Johnston, Coleman & Johnston to George F. Shelton.**

W. M. Johnston    H. J. Coleman    J. H. Johnston.

JOHNSTON, COLEMAN and JOHNSTON.

Lawyers,

Electric Building, Billings, Montana.

December 26, 1922.

Mr. George F. Shelton, Attorney at Law,  
Butte, Montana.

Dear Sir:

Your favor of the 27th instant enclosing applica-



tion for injunction *pendente lite* and affidavit of Mr. Fleming in the case of Fleming vs. Montana Coal & Iron Company received.

We shall not resist the granting of the preliminary injunction.

Yours very truly,

JOHNSTON, COLEMAN & JOHNSTON.

By W. M. JOHNSTON.

WMJ-MH.

Filed January 4, 1923. C. R. Garlow, Clerk.  
[24]

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THEREAFTER, on January 4, 1923, plaintiff's motion for injunction was heard and submitted to the Court, the record thereof being as follows, to wit:

In the District Court of the United States in and  
for the District of Montana.

No. 103.

HENRY S. FLEMING

vs.

MONTANA COAL & IRON COMPANY.

**Motion for Injunction.**

This cause was duly called up at this time, pursuant to notice heretofore given, on plaintiff's motion for an injunction *pendente lite*, Geo. F. Shelton, Esq., appearing for the plaintiff, and there being no appearance in behalf of defendant.

Thereupon Mr. Shelton filed and presented to the Court a letter received from counsel for defendant stating that the defendant does not resist the granting of a preliminary injunction, whereupon the matter was submitted to the Court and taken under advisement.

Entered in open court January 4, 1923.

C. R. GARLOW,

Clerk. [25]

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THEREAFTER, on February 5, 1923, the Court filed its written decision denying injunction herein, which decision is in the words and figures following, to wit: [26]

In the District Court of the United States in and  
for the District of Montana.

No. 103.

FLEMING

vs.

MONTANA COAL & IRON CO.

**Decision of Court Denying Injunction.**

Owning some defendant's bonds, plaintiff seeks to enjoin its purchase in open market of any the issue. It appears the bonds are secured by a trust deed which provides that defendant will maintain a sinking fund of two to five cents per ton of coal by it mined; that whenever this fund amounts to \$10,000, the trustee (Empire Trust Co.) shall solicit and purchase bonds offered at the lowest price but

not to exceed 105; that if offers do not suffice to exhaust the fund, to that end the trustee shall draw by lot, call and redeem bonds at 105; and that at any time defendant may draw by lot, call and redeem bonds at 105.

It further appears that defendant has been purchasing its bonds at par or less in open market, but it does not appear it has failed to perform its contract in respect to the sinking fund.

Plaintiff contends that the methods of redemption of the trust deed are exclusive, that therein he has a prospect of redemption of his bonds at 105 before maturity, and that defendant's open market purchases defeat this prospect and impair his right.

In so far as compulsory redemption prior to maturity is concerned, plaintiff is right; but this in no wise debar defendant from voluntary redemption, that is, from purchasing in open market or private sale any bonds that the owners are willing to sell.

It is very clear that this right of purchase is not of the terms of and is unaffected by the trust deed,—has not been bartered away. Plaintiff has no ground for complaint.

Indeed, it is to plaintiff's advantage that surplus funds are devoted to decrease the bond debt instead of to increase dividends. For thus (apologies to Monsieur Coué) from day to day in every way his security is getting better and better. Nor is it material that defendant does not resist injunction, for injunction is an extraordinary remedy [27]

not to be made ordinary and so abused merely because unresisted.

Denied.

Feb. 5, 1923.

BOURQUIN, J.

Filed Feb. 5, 1923. C. R. Garlow, Clerk. [28]

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THEREAFTER, on February 16, 1923, plaintiff's bill of exceptions was duly signed, settled and allowed and filed herein, being in the words and figures following, to wit: [29]

In the District Court of the United States for the  
District of Montana.

No. 103.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),

Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED that in the above-entitled action the plaintiff filed his bill of equity on the 28th day of November, 1922, in words and figures as follows, to wit: (Clerk will here insert copy of bills).

That thereafter on the 27th day of December, 1922, the plaintiff served upon Johnston, Coleman &



Johnston, attorneys for defendant, his notice of motion for an injunction *pendente lite* in accordance with the prayer of the complaint; which said notice of motion together with the affidavit of service thereon was as follows: (Clerk will here insert notice of motion for injunction *pendente lite* and affidavit of service).

That thereafter on the — day of January, 1923, Johnston, Coleman and Johnston, attorneys for defendant, acknowledged receipt of notice of motion for injunction *pendente lite* and notified counsel for plaintiff that the defendant did not intend to resist the application; which said letter and acknowledgment is in words and figures following: (Clerk will here insert letter).

That on the 4th day of January, 1923, the said motion for injunction *pendente lite* came on for hearing before the Court pursuant to the notice thereof.

That thereupon George F. Shelton appeared as attorney for the plaintiff and there was no appearance at said time for the defendant.

That thereupon counsel for plaintiff moved the Court for an injunction *pendente lite* pursuant to the prayer of the bill of complaint and thereupon introduced and there was filed in said cause upon said hearing the letter of Johnston, Coleman and Johnston, attorneys for defendant as above set forth;

That counsel for plaintiff also filed in said cause at said hearing the affidavit of Henry S. Fleming upon the application for a preliminary injunction,

which said affidavit was duly filed in said cause on said 4th day of January, 1923, a copy of which said affidavit is as follows to wit: (Clerk will here insert copy of affidavit of Henry S. Fleming). [30]

That thereupon, the said motion was submitted to the Court upon said bill of complaint the affidavit of Henry S. Fleming and the said letter of Johnston, Coleman and Johnston, attorneys for the defendant.

The hearing being closed the said application and motion were by the court taken under advisement.

That thereafter on the 5th day of February, 1923, the Court rendered its decision upon said application and motion, and thereupon denied the same, which said decision of the Court is in words and figures following, to wit:

Owning some defendant's bonds, plaintiff seeks to enjoin its purchase in open market of any the issue. It appears the bonds are secured by a trust deed which provided that defendant will maintain a sinking fund of two or five cents per ton of coal by it mined; that whenever this fund amounts to \$10,000, the trustee (Empire Trust Co.) shall solicit and purchase such of the bonds offered at the lowest price but not to exceed 105; that if offers do not suffice to exhaust the fund to that end the trustee shall draw by lot, call and redeem bonds at 105; and that at any time defendant may draw by lot, call and redeem bonds at 105.

It further appears that defendant has been purchasing its bonds at par or less in open market,

but it does not appear it had failed to perform its contract in respect to the sinking fund.

Plaintiff contends that the methods of redemption of the trust deed are exclusive, that therein he has a prospect of redemption of his bonds at 105 before maturity, and that defendant's open market purchases defeat this prospect and impair his right. In so far as compulsory redemption prior to maturity is concerned, plaintiff is right; but this in no wise debars defendant from voluntary redemption, that is, from purchasing in open market or private sale any bonds that the owners are willing to sell. It is very clear that this right of purchase is not of the terms of and is unaffected by the trust deed,—has not been bartered away.

Plaintiff has no ground for complaint. Indeed it is to plaintiff's advantage that surplus funds are devoted to decrease the bond debt instead of to increase dividends.

For thus (apologies to Monsieur Coué) from day to day in every way his security is getting better and better. Nor is it material that defendant does not resist injunction, for injunction is an extraordinary remedy not to be made ordinary and so abused merely because unresisted.

Denied.

BOURQUIN, J.

Feb. 5, 1923.

To which ruling and decision of the Court the plaintiff duly excepted and now within the time allowed by the rules of the court presents this his bill of exceptions to the ruling and decision of the

Court as aforesaid and asks that the same may be settled, allowed and ordered filed in said suit.

[31]

Now, on the 16th day of February, 1923, the said bill of exceptions of the said plaintiff having been duly examined by the undersigned Judge of said Court and found to be a true and correct bill of exceptions, it is hereby certified that the said bill of exceptions is a true and correct bill of exceptions and the same is ordered allowed and settled and filed in said cause.

Dated this 16th day of February, 1923.

BOURQUIN,  
Judge.

Copy of the foregoing bill of exceptions served on me and service accepted this — day of February, 1923.

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Attorney for Defendant. [32]

State of Montana,  
County of Silver Bow,—ss.

George F. Shelton, being first duly sworn, deposes and says that he is a citizen of the United States, and of the State of Montana, over 21 years of age, that he served the enclosed draft of bill of exceptions hereto attached on Johnston, Coleman & Johnston, attorneys for the defendant in the case of Henry S. Fleming vs. Montana Coal & Iron Company, a corporation, on the 9th day of February, 1923, by depositing in the United States Postoffice at Butte, Montana, a copy of said draft of bill of ex-



ceptions enclosed in a sealed envelope, addressed to Johnston, Coleman and Johnston, attorneys at law, Billings, Montana, upon which said envelope was affixed the requisite amount of United States postage stamps to entitle the same to be carried by the mail.

GEORGE F. SHELTON,  
Attorney for Plaintiff.

Subscribed and sworn to before me this 9th day of Feb. 1923.

[Notarial Seal] L. D. BARRY,  
Notary Public for the State of Montana Residing  
at Butte, Montana.

My commission expires December 8, 1925.

Filed February 16, 1923. C. R. Garlow, Clerk.  
[33]

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THEREAFTER, on February 26, 1923, petition for appeal was filed herein in the words and figures following, to wit: [34]

In the District Court of the United States for the  
District of Montana.

HENRY S. FLEMING,  
Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),  
Defendant.

**Petition for Appeal.**

The above-named plaintiff conceiving himself aggrieved by the interlocutory order and decree made and entered on the 5th day of February, 1923, in the above-entitled cause refusing an injunction *pendente lite* in said cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors filed herewith, and he prays that this appeal may be allowed and that the transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

GEORGE F. SHELTON,  
FOLGER & ROCKWOOD,  
Attorneys for Plaintiff.

Filed Feb. 26, 1923. C. R. Garlow, Clerk. [35]

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THEREAFTER, on February 26, 1923, assignment of errors was duly filed herein in the words and figures following, to wit: [36]

In the District Court of the United States for the  
District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),

Defendant.

### Assignment of Errors.

The plaintiff above named in this action in connection with his petition for appeal files the following assignment of errors upon which he will rely in the prosecution of the said appeal in the above-entitled cause from the interlocutory order and decree, refusing an injunction *pendente lite* in said cause, made and entered on the 5th day of February, 1923.

#### I.

The Court erred in refusing an injunction *pendente lite* in the above-entitled cause made upon the application of the plaintiff.

#### II.

The Court erred in holding and deciding that the methods of redemption of the bonds secured by the trust deed are not exclusive and that the plaintiff cannot complain because the defendant voluntarily purchases for redemption in open market or at private sale bonds that the owners are willing to sell and that the defendant has the right to purchase any bonds that it sees fit to purchase and this right is not affected by the trust deed or the terms thereof.

#### III.

The Court erred in holding and deciding that the plaintiff has no grounds for complaint and that it is for the plaintiff's advantage that the surplus funds of the defendant company be devoted to decrease the bond debt instead of to increase the dividends. [37]

IV.

The Court erred in holding and deciding that it is not material that the defendant does not and did not resist the Application for an Injunction and in effect consented thereto.

V.

The Court erred in holding and deciding as follows, to wit:

“Owning some defendant’s bonds, plaintiff seeks to enjoin its purchase in open market of any the issue. It appears the bonds are secured by a trust deed which provided that defendant will maintain a sinking fund of two or five cents per ton of coal by it mined; that whenever this fund amounts to \$10,000, the trustee (Empire Trust Co.) shall solicit and purchase such of the bonds offered at the lowest price but not to exceed 105; that if offers do not suffice to exhaust the fund to that end the trustee shall draw by lot, call and redeem bonds at 105; and that at any time defendant may draw by lot, call and redeem bonds at 105.

It further appears that defendant has been purchasing its bonds at par or less in open market, but it does not appear it had failed to perform its contract in respect to the sinking fund.

Plaintiff contends that the methods of redemption of the trust deed are exclusive, that therein he has a prospect of redemption of his bonds at 105 before maturity, and that defendant’s open market purchases defeat this prospect and impair his right. In so far as compulsory redemption prior to maturity is concerned, plaintiff is right;



but this in no wise debars defendant from voluntary redemption, that is, from purchasing in open market or private sale any bonds that the owners are willing to sell. It is very clear that this right of purchase is not of the terms of and is unaffected by the trust deed,—has not been bartered away.

Plaintiff has no ground for complaint. Indeed it is to plaintiff's advantage that surplus funds are devoted to decrease the bond debt instead of to increase dividends.

For thus (apologies to Monsieur Coué) from day to day in every way his security is getting better and better. Nor is it material that defendant does not resist injunction, for injunction is an extraordinary remedy not to be made ordinary and so abused merely because unresisted."

WHEREFORE defendant prays that the interlocutory order of the Court denying the injunction applied for may be reversed.

GEORGE F. SHELTON,  
FOLGER & ROCKWOOD,  
Attorneys for Plaintiff.

Filed Feb. 26, 1923. C. R. Garlow, Clerk. [38]

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THEREAFTER, on February, 26, 1923, order allowing appeal was filed and entered herein in the words and figures following, to wit: [39]

In the District Court of the United States for the  
District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Cor-  
poration),

Defendant.

**Order Allowing Appeal.**

On this 26th day of February, 1923, came the plaintiff by his attorneys and filed herein and presented to this court, his petition, praying for the allowance of an appeal and assignment of errors intended to be urged by him, praying also that the transcript of record and papers and proceedings upon which the order and decree herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof this Court does allow the appeal upon the defendant giving bond according to law in the sum of three hundred (\$300.00) dollars.

BOURQUIN,  
Judge.

Filed Feb. 26, 1923. C. R. Garlow, Clerk. [40]

THEREAFTER, on February 26, 1923, bond on appeal was duly filed herein, in the words and figures following, to wit: [41]

In the District Court of the United States for the  
District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),

Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
That Henry S. Fleming, as principal, and Aetna Casualty & Surety Company, of Hartford, Connecticut, as surety, are held and firmly bound unto the defendant in error, Montana Coal & Iron Company, a corporation, in the full and just sum of three hundred dollars (\$300.00), to be paid to the said defendant, Montana Coal & Iron Company, a corporation, its certain attorneys, successors or assignees, to which payment well and truly to be made, we bind ourselves and our successors, jointly and separately, by these presents.

Sealed with our seals and dated this 26th day of February, 1923.

WHEREAS the above-named plaintiff has prosecuted an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse the interlocutory order and decree made and entered in the District Court

of the United States for the District of Montana in the above-entitled cause refusing an injunction *pendente lite* in said cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff shall prosecute his said appeal with effect and answer all costs if he fail to make the said plea good; then the above obligation to be void otherwise to remain in full force and effect.

HENRY S. FLEMING,

By GEORGE F. SHELTON,

His Attorney.

AETNA CASUALTY & SURETY CO.,

By PAUL WOLCOTT,

Resident Vice-President.

[Seal]

Attest: S. G. ZABEL,

Resident Asst. Sec.

Approved by:

BOURQUIN,

District Judge.

Filed Feb. 26, 1923. C. R. Garlow, Clerk. [42]

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THEREAFTER, on February 26, 1923, citation on appeal duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [43]



In the District Court of the United States for the  
District of Montana.

HENRY S. FLEMING,

Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Cor-  
poration),

Defendant.

**Citation on Appeal.**

To Montana Coal & Iron Company (a Corporation),  
GREETINGS:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, in said Circuit, on the 28th day of March, next, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the United States District Court for the District of Montana, wherein Henry S. Fleming is appellant, and you are appellee, to show cause, if any there be, why the interlocutory order and decree made and entered against the said appellant as in the said order allowing said appeal mentioned should not be corrected and why justice should not be done to the parties in that behalf.

This 26th day of February, in the year of our Lord one thousand nine hundred and twenty-three

of the Independence of the United States of America the one hundred and forty-sixth (146) year.

BOURQUIN,

U. S. District Judge.

[Seal]

Attest: C. R. GARLOW,  
Clerk.

By L. R. Polglose,  
Deputy.

I hereby this 10th day of March, 1923, accept due personal service of this citation on behalf of the Montana Coal & Iron Company, Appellee.

THOS. M. KEARNEY,

JOHNSTON, COLEMAN & JOHNSTON,

Attorneys for Appellee. [44]

[Endorsed]: In the District Court of the United States for the District of Montana. Henry S. Fleming, Plaintiff, vs. Montana Coal & Iron Company (a Corporation), Defendant. Citation on Appeal. Filed March 13, 1923. C. R. Garlow, Clerk. By L. R. Polglose, Deputy. [45]

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THEREAFTER, on March 13, 1923, plaintiff's praecipe for transcript on appeal was filed herein in the words and figures following, to wit: [46]

In the District Court of the United States in and for the District of Montana.

HENRY S. FLEMING,

Appellant and Plaintiff,

vs.

MONTANA COAL & IRON COMPANY (a Corporation),

Appellee and Defendant.

**Praeceptum for Transcript of Record.**

To the Clerk of the United States District Court  
for the District of Montana.

In preparing the copy of the record for transmission to the Circuit Court of Appeals for the Ninth Circuit, on appeal sued out and the citation issued on the application of Henry S. Fleming, plaintiff, please incorporate in the record copies of the following documents and papers, to wit: Bill of exceptions; order and decree refusing injunction *pendente lite*; petition for appeal; assignment of errors; order allowing appeal; bond and original citation.

GEORGE F. SHELTON,  
FOLGER & ROCKWOOD,

Attorneys for Appellant and Plaintiff.

Copy received this 10th day of March, 1923.

JOHNSTON, COLEMAN & JOHNSTON,  
THOS. M. KEARNEY,

Attorneys for Appellee and Defendant.

Filed March 13, 1923. C. R. Garlow, Clerk.  
[47]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Cir-

cuit, that the foregoing volume, consisting of 47 pages, numbered consecutively from 1 to 47, inclusive, is a full, true and correct transcript of the record and proceedings had in the within entitled cause, and of the whole thereof, required to be incorporated in the record on appeal therein by praecipe filed, as appears from the original records and files of said Court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of sixteen and 25/100 Dollars (\$16.25), and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 20th day of March, A. D. 1923.

[Seal]

C. R. GARLOW,  
Clerk. [48]

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[Endorsed]: No. 3995. United States Circuit Court of Appeals for the Ninth Circuit. Henry S. Fleming, Appellant, vs. Montana Coal & Iron Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed March 23, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





No. 3995

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IN THE  
United States Circuit Court  
of Appeals

For the Ninth Circuit

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HENRY S. FLEMING,

*Appellant,*

vs.

MONTANA COAL & IRON COM-  
PANY,

*Appellee.*

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BRIEF FOR APPELLANT.

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GEORGE F. SHELTON,  
FOLGER & ROCKWOOD,  
*Counsel for Appellant.*



No. 3995.

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IN THE  
**United States Circuit Court**  
**of Appeals**

**For the Ninth Circuit**

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HENRY S. FLEMING,  
*Appellant,*

vs.

MONTANA COAL & IRON COM-  
PANY,  
*Appellee.*

---

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

This case is here on appeal from the United States District Court for the District of Montana, taken by Henry S. Fleming, plaintiff below, appellant here, to reverse an interlocutory order and decree made and rendered against him in favor of Montana Coal & Iron Company, defendant below, appellee here, refusing an injunction pendente lite, because of certain errors set forth in the assignment of errors.



The suit was brought by Henry S. Fleming vs. Montana Coal & Iron Company, to enjoin using the funds of the corporation in the purchase of outstanding bonds issued under the indenture of trust, and mortgage, made and executed by the defendant company to Empire Trust Company, under date of January 2, 1912, except according to the terms, conditions and provisions set forth and contained in said mortgage, together with other relief and asking for an interlocutory injunction during the pendency of the suit in accordance with the said prayer of the complaint.

The complaint duly verified by Henry S. Fleming was filed on the 28th day of November, 1922. On the 27th day of December, 1922, notice of motion for an injunction pendente lite in accordance with the prayer of the complaint was duly filed.

On the 26th day of December, 1922, counsel for the defendant acknowledged receipt of said notice of motion and duly notified counsel for plaintiff that defendant did not intend to resist the said application.

That on the 4th day of January, 1923, said motion for injunction pendente lite came on for hearing before the court pursuant to said notice and thereupon there was filed in said cause the letter of counsel for defendant, stating that the defendant did not resist said application. There was also filed in said cause at said hearing the affidavit of Henry S. Fleming. Said motion was then submitted to the court upon the bill of complaint, the affidavit of Henry S. Fleming and the letter of counsel for the defendant, and the matter taken under advisement by the court. That

thereafter on the 5th day of February, 1923, the court rendered its decision upon the said application and motion and then and there denied the same.

A bill of exceptions to the ruling of the court was duly prepared, served, signed, settled and allowed and filed in said suit; that thereafter and within thirty days from the entry of said order and decree the plaintiff on the 26th day of February, 1923, filed his petition for an appeal from said interlocutory order and decree, together with an assignment of errors and on the 26th day of February, 1923, the court by an order duly given and made on said day, allowed said appeal, approved the bond given in accordance with said order of court and thereupon citation was duly issued and served and the suit brought into this court pursuant thereto.

The facts which for the purpose of this hearing must be taken as true as set forth in the verified complaint and in the affidavit of Henry S. Fleming, established that Henry S. Fleming was at the time of the commencement of the suit and for a long time prior thereto had been the owner of certain bonds issued by the defendant corporation, which said bonds were secured by a certain mortgage made by defendant company, to the Empire Trust Company. The mortgage contained among other provisions the following:

“In trust, nevertheless, for the equal pro rata benefit and security of all the holders of any of the above mentioned bonds and coupons at what period soever the same may be issued, without any preference or priority of one bond over an-

other, except as hereinafter mentioned, and for the uses and purposes, and on the conditions, covenants and restrictions herein declared and expressed."

The said mortgage further provided for the creation of a sinking fund, which was to be for the benefit and security of the bonds issued and to be issued. In the said mortgage, the creation of the sinking fund is provided for by directing that:

"Beginning with the second day of January, 1914, and thereafter, and until all the bonds issued and to be issued under this indenture are fully paid and canceled, an amount which for and during the period of three years ending January 2, 1917, shall equal the sum of two cents, and which thereafter for and during the period of ten years ending January 2, 1927, shall equal the sum of three cents, and which thereafter for and during the period of ten years ending January 2, 1937, shall equal the sum of four cents, and which thereafter and so long as any of the bonds hereby secured may be outstanding, shall equal the sum of five cents, in each instance for and in respect of each and every ton of two thousand two hundred and forty pounds of run of mine coal mined or taken during the preceding period of six months ending on each second day of January or July (as the case may be), from any of the property at the time of such mining or taking subject to this indenture or provided or agreed to be subject or subjected thereto, whether the property from which such coal is mined or taken is held in fee

or under lease by the Company or any subsidiary company or by others under leases or other instruments heretofore or hereafter executed by either of them or in any other manner and by whomsoever said coal may be mined or taken."

It is then provided that all payments into the sinking fund in said article provided for, shall be disposed of and applied solely as in said article of said indenture specified and provided.

It is then specified that said money and all moneys paid into or becoming a part of the sinking fund mentioned in said article shall by the trustee upon receipt thereof be applied in this manner: That whenever the money in the sinking fund shall amount to ten thousand (\$10,000) dollars or more the trustee shall advertise for written proposals to sell to it bonds secured by said mortgage and then outstanding to the extent of the funds then in its hands available and shall purchase the bonds offered at the least price asked therefor; that if upon such advertisement no proposal to sell bonds shall be made, at or below the price named, that the money in the funds shall be applied to the redemption of bonds at the rate of 105 per centum of the principal thereof with all interest accrued and unpaid at the time fixed for such redemption and it is specified that in order to determine what bonds may be redeemed at said figure, the determination is to be made by lot in the manner specified in said mortgage.

There is another provision in the mortgage wherein it is provided for as follows:



“It is further covenanted, promised and agreed that at any time hereafter, and prior to the time when the principal sum secured by the said bonds shall become due, the Company may make a call for the redemption of the whole or any part of said issue of bonds then outstanding in the manner and with the effect hereinafter stated.

“The bonds to be redeemed under such call shall be determined by lot by placing pieces of paper of equal size and appearance and equal in number to the bonds outstanding, with numbers on them respectively corresponding to the numbers of the respective bonds outstanding, in a wheel or box, and after properly and thoroughly commingling the same, such pieces of paper shall be drawn out, one at a time, by a person appointed for that purpose by resolution of the Board of Trustees of the Company, until sufficient amount of the bonds represented thereby shall have been drawn to equal the amount at their par value of the bonds called for redemption, with accrued interest to date of call, plus the amount of premium required to be paid upon the same. The Company shall thereupon give notice by public advertisement in one newspaper published in the City of Billings, Montana, and one newspaper published in the City of New York, daily for one week, the last publication to be finished at least thirty days before the date fixed for said redemption, and any such advertisement shall state the number and par value of the bonds so drawn for redemption, and also that said bonds have under the provisions of the mortgage been determined by lot as bonds to be redeemed by the Company, at the time and place



mentioned in the said notice. Said notice so published shall further state that the said bonds are called for redemption at a place in the City of New York therein mentioned, at a date and hour therein mentioned, not less than thirty days nor more than two months from the date of the last publication, at which time and place said Company shall redeem said bonds by paying the principal and accrued interest due thereon to date of actual redemption, plus a five (5) per cent. premium on the amount of the par value of principal thereof."

By the terms of the mortgage, redemption is provided for prior to the maturity of the bonds in two specific provisions and two only.

First: Under the sinking fund provision.

Second: Under the call for the redemption of the whole or any portion of said bonds.

Under the sinking fund provision there must be an advertisement published, calling for the offer of bonds for sale to the Company at a price not to exceed 105 per centum of the principal. If no bonds are offered for sale to the Company under that advertisement then the amount of money available in the sinking fund is to be applied to the redemption of bonds selected by law at 105 per centum of the principal.

Under the provision for the redemption of bonds by the Company not required by the sinking fund provision a call for redemption of bonds determined by lot is provided for, thirty days' notice must be published

and the bonds selected by lot redeemed at 105 per centum of the principal.

The defendant Company entirely disregarded and violated both of the provisions of the mortgage above set forth in that it redeemed bonds prior to the maturity thereof, without in any manner attempting to conform to the requirements and provisions of the Deed and Mortgage, by buying bonds at any price for which they were offered and could be purchased and thereupon canceling the same contrary to the terms of the mortgage, using for this purpose the funds of the corporation. It is admitted that the Company has purchased bonds at a price below par to the extent of more than one hundred thirty-eight thousand (\$138,000); that it threatens to continue so to do and to disregard and violate the terms and conditions of the mortgage to the irreparable injury and damage of the bondholders among whom the plaintiff is one.

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## ASSIGNMENT OF ERRORS.

### I.

The court erred in refusing an injunction pendente lite in the above entitled cause made upon the application of the plaintiff.

### II.

The court erred in holding and deciding that the methods of redemption of the bonds secured by the Trust Deed are not exclusive and that the plaintiff cannot complain because the defendant voluntarily purchased for redemption in open market or at private

sale bonds that the owners are willing to sell, and that the defendant has the right to purchase any bonds that it sees fit to purchase and this right is not affected by the Trust Deed or the terms thereof.

### III.

The court erred in holding and deciding that the plaintiff has no grounds for complaint and that it is for the plaintiff's advantage that the surplus funds of the defendant Company be devoted to decrease the bond debt instead of to increase the dividends.

### IV.

The court erred in holding and deciding that it is not material that the defendant does not and did not resist the Application for an Injunction and in effect consented thereto.

### V.

The court erred in holding and deciding as follows, to wit:

"Owning some defendant's bonds, plaintiff seeks to enjoin its purchase in open market of any the issue. It appears the bonds are secured by a trust deed which provided that defendant will maintain a sinking fund of two or five cents per ton of coal by it mined; that whenever this fund amounts to \$10,000, the trustee (Empire Trust Co.) shall solicit and purchase such of the bonds offered at the lowest price but not to exceed 105; that if offers do not suffice to exhaust the fund to that end the trustee shall draw by lot, call and redeem bonds at 105; and that at any time defendant may draw by lot, call and redeem bonds at 105.

It further appears that defendant has been purchasing its bonds at par or less in open market, but it does not appear it had failed to perform its contract in respect to the sinking fund.

Plaintiff contends that the methods of redemption of the trust deed are exclusive, that therein he has a prospect of redemption of his bonds at 105 before maturity and that defendant's open market purchases defeat this prospect and impair his right. In so far as compulsory redemption prior to maturity is concerned, plaintiff is right; but this in no wise debars defendant from voluntary redemption, that is, from purchasing in open market or private sale any bonds that the owners are willing to sell. It is very clear that this right of purchase is not of the terms of and is unaffected by the trust deed—has not been bartered away.

Plaintiff has no ground for complaint. Indeed, it is to plaintiff's advantage that surplus funds are devoted to decrease the bond debt instead of to increase dividends.

For thus (apologies to Monsieur Coue) from day to day in every way his security is getting better and better. Nor is it material that defendant does not resist injunction, for injunction is an extraordinary remedy not to be made ordinary and so abused merely because unresisted."

## ARGUMENT.

This is an appeal from an order made and entered in the United States District Court for the District of Montana, denying an application made by the plaintiff herein for an injunction *pendente lite*. The plaintiff, as a holder of certain bonds of the defendant company, seeks by his bill in equity, filed in this action, perpetually to restrain the defendant company from purchasing from individual bondholders and retiring bonds of the same issue otherwise than in the manner provided by the mortgage securing those bonds. The application for a temporary restraining order, although unopposed by the defendant was, nevertheless, denied by the court.

The facts upon which the plaintiff relies to entitle him to the relief prayed for are contained in his bill of complaint and in his affidavit filed in support of his application. Those facts are not disputed. In substance they are as follows: In 1912, the defendant company authorized and issued its first mortgage bonds to the par value of some \$750,000, secured by an Indenture of Trust and Mortgage covering all of the lands owned by the company. This indenture made provision for the operation of a sinking fund to be created by the payment to the trustee of a certain sum per ton of coal mined, and further provided, that such sinking fund whenever it reached the sum of \$10,000. should be used for the purpose of retiring the company's bonds. It is admitted that the defendant has complied with the terms of the sinking fund provisions. The Trust Mortgage, however, further



provided for the redemption by the company of any part or all of the bonds prior to their maturity date upon certain specified terms and conditions requiring, among other things, that the particular bonds to be redeemed under such clause, if less than the whole issue then outstanding, should be determined by lot and that the holder should receive for the bond when so redeemed a premium of five per cent (5%) of the par value. It is admitted that the company has purchased at private sale a very large number of the bonds issued under this mortgage and that such bonds have in turn been canceled and retired. The plaintiff contends that the retirement of bonds in this manner is not in accordance with the terms of the mortgage under which the bonds were issued. It is admitted that unless restrained the company proposes to make further purchases and retirements in similar manner and the plaintiff therefore seeks through this action and pending its final determination to restrain the company from making such further purchases for the purpose of retiring and canceling the bonds purchased.

#### POINT I.

IT IS UNDISPUTED THAT BONDS HAVE ACTUALLY BEEN RETIRED BY THE DEFENDANT OTHERWISE THAN ACCORDING TO THE PROVISIONS OF THE TRUST MORTGAGE.

The plaintiff does not contend that the mere purchase of its own bonds by a corporation necessarily

amounts to a retirement. It is quite conceivable that a corporation may invest its surplus funds in its own securities and either hold them for resale or reissue, and that which is not tantamount to a retirement since the outstanding obligation of the company under the trust mortgage is not altered, nor is one bondholder preferred over another. It is not disputed, however, that such are not the facts in the case at bar. Here the bonds were purchased and actually canceled and retired and the bonded indebtedness of the corporation reduced by that amount. It follows obviously, that the only question presented by the case is whether the corporation may retire its own bonds in a manner other than as provided in the Trust Deed under which those bonds are issued.

## POINT II.

THE DEFENDANT COMPANY IS BOUND BY THE TERMS OF THE MORTGAGE UNDER WHICH THE BONDS ARE ISSUED TO RETIRE OR REDEEM BONDS PRIOR TO MATURITY ONLY IN THE MANNER EXPRESSLY PROVIDED IN THE MORTGAGE.

The mortgage and the bond owned by any holder unquestionably constitutes a contract obligation on the part of the defendant or issuing company. That contract, although in part made with a trustee, is made for and inures to the benefit of the individual bondholder. The defendant Company is bound by the terms of that contract and the holder of a bond is bound by its terms, while mortgage and bond together con-

tain all the terms of the contract and define distinctly and absolutely the rights and liabilities of the parties. *Low v. Blackford*, 87 Fed., 392. The company has a right to insist, unless otherwise provided in the contract, that the holder make no demand for the payment of the principal of any bond until its maturity date and, on the other hand, any bondholder, unless it be otherwise provided in the mortgage or the bond, has the right to rely on the payment of the company's obligation exactly in accordance with its terms. While it may be and probably is true that any individual bondholder may waive any provision of the contract in his favor in so far as it affects him personally, that waiver will not be binding upon another bondholder against his wish. Thus, even if one bondholder is willing that his bond should be retired before maturity the effect of that retirement is felt by the other bondholders, since the funds used for the retirement of that bond might otherwise be used in the retirement of the bond of one of the other holders. In other words, the trust mortgage is so framed as to provide that if the company has funds available to the redemption of bonds every bondholder has an equal chance with every other that his particular bond shall be redeemed at the profit provided by the mortgage. Therefore, no one holder can by his action bind any other holder against the latter's wish to a waiver of the right to the chance that the latter's bond shall be the one to be redeemed. *Hackettstown National Bank v. D. G. Yucngling Brewing Co.*, 74 Fed., 110. It is not for a moment contended that the company is

obliged to use any of its funds over the sinking fund requirements, in the redemption of the bonds. But that *if* so used it must be used in accordance with the contractual obligations of the parties. If any of the bonds, therefore, are to be retired before their maturity date, the right to advance the date of retirement must be accorded to the company by a particular and definite provision in the Trust Mortgage.

The action of the company in retiring bonds acquired with its corporate funds accomplishes an obvious preference of the bonds so retired over those outstanding. Yet on page 20 of the Mortgage, it is distinctly provided that no such preference shall be given:

*"Now, therefore, this indenture witnesseth, That for the purpose of securing the due and punctual payment of the principal of said bonds to be issued, or which may, as herein mentioned, be issued, amounting in the aggregate to not more than seven hundred and fifty thousand dollars (\$750,000.) and each and every one of said bonds, together with the interest thereon, without any preference or priority of any of said bonds above mentioned, or series of bonds, over any other, according to the true intent and meaning thereof, and in consideration of the recited premises. . . . ."*

The company has given certain selected bondholders priority in a cash return on their bonds at a time when it was beneficial to those holders to secure that cash return. As the bonds in question bear interest



only at the rate of five per cent it was distinctly to the advantage of a holder to have his bonds purchased at a time when money commanded a far higher rate of interest. In failing with the corporate funds available to redeem bonds in accordance with the provisions of the mortgage the majority control of the defendant company deprived the bondholders generally, of knowledge of the proposed redemption of the bonds, as well as of the right, which inured to them by virtue of the terms of the mortgage, to have their bonds redeemed at that advantageous time. By such act the favored bonds were given a definite and decided preference and priority over the less favored bonds. That clearly violated the quoted provision of the mortgage given, to secure these bonds and the terms of which absolutely govern the parties. The sanctity of contract has ever been one of the cardinal principles of our law and bondholders acquire and hold their bonds in reliance on that principle as applied both to the bonds and the mortgage securing them. But sanctity of contract must be forgotten if a company is to be permitted thus wilfully to ignore the plain, clear provisions of its contract.

The mortgage given by the defendant company to secure the issue of bonds now in suit provides that the bonds shall be due and payable thirty (30) years from the date of the mortgage and also that there shall be "no priority of one bond over another." It further provides two methods, but only two, by which the maturity date of the bonds may be anticipated by the company. The first is through the operation of



the sinking fund, with which we are not presently concerned. The second is through a call for redemption at any time of all or any part of the issued and outstanding bonds. The provision for this method of payment is contained in paragraph 29 of the mortgage (page 42). That paragraph is set forth in full in the affidavit of Mr. Fleming, submitted on the application below. We quote here, however, certain particularly pertinent expressions from that paragraph:

"It is further covenanted, promised and agreed that at any time hereafter and prior to the time when the principal sum secured by the said bonds shall become due, the company may make a call for the redemption of the whole or any part of said issue of bonds then outstanding in the manner and with the effect hereinafter stated. The bonds to be redeemed under such call shall be determined by lot \* \* \*. Said company shall redeem said bonds by paying the principal and accrued interest due thereon to date of actual redemption, plus a five (5) per cent premium on the amount of the par value of principal thereof."

Other than the provisions governing the payment of the bonds at maturity, the sinking fund provision and the paragraph above quoted are the only methods provided in the mortgage, which in turn, determines the right of the parties in respect of the payment of the bonds. In other words, the contract between the parties stipulates that the bonds shall be either paid at maturity or prior thereto, by the operations of the sinking fund or under the provisions of paragraph 29

on page 42. The plaintiff claims that a retirement, if accomplished in any other manner than one of those two, constitutes a clear violation of the terms of the contract in that respect. It is the employment of corporate funds for the redemption of these obligations in a manner which the terms of the mortgage do not contemplate. Such a violation deprives the plaintiff of a substantial right, for as much as it deprives him of an opportunity to have one or more of his bonds redeemed at a premium through their selection by lot in the manner provided by the paragraph quoted.

The rights of bondholders are fixed by the terms of the mortgage and those terms cannot be altered without the consent of the bondholders. In *Vose v. Bronson*, 73 U. S., 452, 18:846 it is said: "No prudent man would ever buy a bond in the market if the provisions made for its ultimate redemption could be altered without his consent."

It is not necessary to call the court's attention to the fact that corporate securities are purchased for investment on the strength of their maturity and redemption provisions. The possibility of the payment of a premium in the event of a call for the redemption of a part or all of the issue and thus the earlier release at a profit of the money invested in that security is one of the features of the bond for which the purchase price is paid. The issuing company should not be permitted to connive to avoid the payment of that premium, or in effect, itself to select certain bonds for redemption to the exclusion of others. To permit that feature of the bond to be wilfully abrogated by

the company through the purchase at private sale and retirement of some of its bonds is to deprive the holder of a right which was a part of the consideration paid by him for the bond. The invasion of that right is an injury. It represents a definite loss to the bondholder through the substitution of a new contract for that originally entered into. In the case of *Lisman v. Michigan, etc. Co.*, 50 N. Y., A. D. 311, the court holds that that construction of the mortgage was to be adopted which was most favorable to the bondholders and which would not impair their security in any way. "Bondholders have the right to insist that the defendant shall carry out his contract; that it shall pay its bonds when it agreed to, not before, and that in the meantime the interest shall be paid at the time stipulated." We quote also from the opinion in that case: "When all of the provisions of the mortgage are thus read and construed together, it is clear that it was never intended to give to the mortgagor the right by its own act to pay the principal of the bonds in advance of the time specified in them when the same would mature. Any other construction would not only be unreasonable and unfair to the bondholders, but contrary to the express provisions of the mortgage." The principle is the same whether the company attempts to force the bondholder to surrender his bond before it becomes due or whether, as in this case, the bondholder seeks to prevent the company from preferring one bond over another. The contract would lack mutuality unless that were true.

It is well settled that payment of an indebtedness

secured by a mortgage cannot be enforced prior to the time fixed for the payment thereof. Neither the one party nor the other can make a new contract except by mutual consent and the court will not at the instance of either substitute a new contract for that originally entered into. The rule applies not only to the individual bond and mortgage, but to the great issues of corporate securities made for the ultimate benefit of a large number of individuals and surrounded and safeguarded in every direction. See Jones on Mortgages, Vol. 2, Sec. 1052; *Abbe v. Goodwin*, 7 Conn., 377; *Chicago, etc. Co. v. Pyne*, 30 Fed., 86, at page 90.

On the other hand, a corporation cannot compel a bondholder to accept payment of his bond before maturity against his objection unless such payment is made in accordance with a particular provision of the bond and mortgage. See *Missouri, Kansas and Texas Railway Co. v. Union Trust Co.*, 156 N. Y., 592, 51 N. E., 309; *Harnickell v. Omaha Water Co.*, 146 N. Y. App. Div., 693, affirmed, 208 N. Y., 520; *Lisman v. Michigan, etc. Co.*, 50 N. Y. App. Div., 311.

As a corporation cannot compel a bondholder to accept payment before maturity other than in accordance with the provisions of the contract agreement, certainly a bondholder can insist that the company redeem a part of its bonds only in that method which is recognized under the contract.

In the *Harnickell* case, cited above, the court says, at page 701: "The bondholders have a right to insist that the defendant shall carry out its contract; that it



shall pay its bonds when it agreed to, and not before, and that in the meantime the interest shall be paid at the times stipulated."

The words of paragraph 29 of the mortgage quoted above read in connection with the words of the bond, the form of which is incorporated in the mortgage, are to be construed as mandatory upon the company if bonds are to be redeemed before maturity. The provision of the mortgage is that "at any time \* \* \* the company may make a call" and that the bonds to be redeemed "shall be determined by lot" and the company "shall" pay, etc.; the bond states that it is "*entitled to redemption*" in accordance with the terms of the Trust Mortgage. As the bonds derive their being from and are entirely subject to the terms of the mortgage securing them it is obvious that this clause gives the company a specific right to which it was not otherwise entitled. At the same time the mortgage provides that the holder of a bond is "entitled" to the benefit of that provision and the rights of the bondholder in that respect cannot be disregarded. Therefore, the mortgage by that provision excludes any other method (except the sinking fund) of redeeming the bonds prior to maturity. The effect of the provision is permissive in so far as it gives the company a right to redeem before maturity, but it is distinctly mandatory and exclusive in stating the method by which that redemption shall be made.

It is, we submit, obvious that the corporation could not make a call for the redemption of a part or all of its issue of the bonds at par and accrued interest rather than at the redemption price of 105. The bonds



were issued by the company upon the distinct condition that except as they might be retired under the sinking fund provisions they should all remain outstanding until their maturity unless a premium was paid for an earlier redemption. The bondholder has the right to have the funds of the corporation used for the purpose of redemption at a premium if any redemption is to be made. The company is, therefore, doing by indirection that which it is obviously unable to do directly. In doing so, it is invading the rights of this plaintiff to his irreparable damage. The loss of his rights are absolute as soon as the money is expended by the company and those rights cannot be recalled or restored to him. That the company intends further redemption in like manner in the future is not questioned and the plaintiff will suffer further irreparable injury and the repeated breaches of the company's contract should have been restrained by the District Court.

### POINT III.

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER BE GRANTED.

Respectfully submitted,

GEORGE F. SHELTON,

*Attorney for Plaintiff-Appellant,  
Butte, Montana.*

FOLGER & ROCKWOOD,

*Of Counsel for Plaintiff-Appellant.*

IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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HENRY S. FLEMING,

Appellant,

vs.

MONTANA COAL & IRON COMPANY,

Appellee.

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BRIEF FOR APPELLEE.

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THOMAS M. KEARNEY,

Racine, Wisconsin,

JOHNSTON, COLEMAN & JOHNSTON,

AND W. J. JAMESON, JR.,

Billings, Montana,

Counsel for Appellee.



NO. 3995

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IN THE

United States  
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HENRY S. FLEMING,

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BRIEF FOR APPELLEE.

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In this case the appellant seeks to enjoin the appellee from using its surplus funds in the purchase and retirement of its own bonds at prices lower than, and in a manner different from, that provided in the compulsory retirement clause of the trust mortgage securing such bonds, which is referred to in the pleadings and the brief for the appellant as section 29.

As counsel for the appellant clearly state under point 2 of their brief, and restate many times throughout their argument, the rights of the mortgagor and of the bondholders in this regard are governed solely by the terms of the trust mortgage and bonds which constitute

the contract between these parties. Therefore the rights of the appellant in this case are solely dependent upon the terms of this contract.

If the action of the appellee corporation in bargaining with the individual bondholder for the purchase or redemption prior to their maturity of the bonds held by him abrogates, or conflicts with, none of the rights guaranteed the bondholders in general under the terms of the mortgage or bonds, certainly there is no rule of law or public policy which would forbid such action.

American Etc. Co. v. N. Y. Ry. Co., 277 Fed. 282.

Barry v. Missouri Etc. Co., 34 Fed. 829.

Jones on Corporate Bonds and Mortgages, Sec. 325.

Is there any provision of the contract, which, fairly construed, would prevent such action by the appellee and afford a reasonable ground for appellant's complaint?

In the pleadings filed in this suit and in the brief for appellant, three clauses in the trust mortgage are referred to and quoted. One of these is the provision for maintenance of a sinking fund and the expenditure thereof by the trustee for the redemption and retirement of bonds in the manner therein provided. At page 11 of their brief counsel for appellant admit that the defendant has complied with the terms of the sinking fund provisions and therefor no further consideration need be given thereto.

The first paragraph of the mortgage upon which counsel for appellant rely in this suit is the provision contained on page 20 of the mortgage and quoted at page 15 of the brief. This provision is a recital obviously referring to the property mortgaged as security for the



bonds, and simply meaning that the property covered by the mortgage is to be held for the payment of all of the bonds and that no bond shall by reason of its date, number or series of issue have priority over any other bonds secured by the same mortgage in the application of such property to the payment of the indebtedness. It is true that the bonds are ratably secured by the mortgage but only as to the property pledged as security. The company did not pledge its earnings otherwise than to the extent covered by the sinking fund provisions. Therefore, certainly where the appellee out of its surplus funds purchased the bonds owned by individuals, such action constituted no preference as to the remaining bonds secured by the mortgage, within the terms or contemplation of the provision referred to.

It will hardly be contended that the appellee does not have the right to use its net earnings as it may see fit, so long as the sinking fund is maintained in accordance with the terms of the mortgage. It might use its net earnings to purchase other property, for development work, for the purchase of coal cars, or in distributing increased dividends to its stockholders. Such use would in nowise increase the security for the unpaid bonds or be of any benefit to the bondholders. The net earnings of the company, not being pledged to the payment of the bonds except insofar as is necessary to comply with the sinking fund provisions of the mortgage, may be used by the appellee without regard to the provisions of the mortgage. Having the right to use such earnings as appellee may see fit to do, surely it should have the right to use such net earnings in buying up and canceling its

mortgage debt and thereby increase the security for the payment of the unpurchased bonds.

It is not stated in the bill of complaint that the appellant was not given an opportunity to sell his bonds to the appellee on the same terms and conditions that the other bonds were purchased and retired out of the net earnings of the company, so there is no showing that he has been discriminated against by the appellee.

The second provision referred to, being contained in paragraph 29 of the mortgage, gives the appellee corporation the right to advance the maturity of all or any portion of the bonds in the manner and by paying the price therein provided. It is contended by counsel that this, aside from the sinking fund provision, provides the only method by which the appellee can retire its bonds prior to their maturity; that it is exclusive, and if the mortgagor wishes to retire its bonds, it must follow the method provided in this section.

The reason for, and intent and the meaning of the clause in question seems to us to be too clear to require argument or explanation. As argued by counsel and held by the cases they cite, a corporation cannot compel a bondholder to accept payment of his bond before maturity against his objection, unless such payment is made in accordance with a particular provision of the bond and mortgage. This, of course, is elementary. If the mortgage involved in this action did not contain provisions similar to those set forth in paragraph 29 thereof, the appellee corporation could not of right redeem any of its bonds prior to their maturity save through the sinking fund plan. The provision in question simply

gives the corporation the right to compel a bondholder to accept payment before maturity and in compensation provides that such bondholder so forced to accept payment shall receive an additional five per cent. upon the face of his bonds as consideration for the advanced termination of his investment. It confers upon the mortgagor a right or privilege which would have been wanting in its absence and which is provided as an exclusive method for compelling unwilling bondholders to relinquish their investments; but that is all, and there is no word or expression therein contained showing or tending to show that the corporation is thereby precluded from adopting any other method of purchasing its bonds.

Therefore, inasmuch as the action of appellee conflicted with no provision of the contract in question, appellant has no ground for his action herein.

## II.

If we were to admit that the action of the appellee in the matters complained of did conflict with the wording of the provisions referred to by counsel, we would still insist that the appellant has failed to show himself entitled to the relief sought.

That injunction is an extraordinary remedy is elementary and as is suggested by the learned trial court in this suit, it is not a remedy to be granted easily and lightly at the mere request of a litigant. To entitle a party to injunctive relief, it must appear that, without it, some real and substantial right will be invaded and that he will suffer an irreparable injury.

On the other hand, if it does not appear that there is at least a reasonable probability that the granting of the

injunction will be effective and result in some benefit to the applicant, there is no reason that we know of why injunction should issue, for if the issuance of the injunction brings no relief, there is no reason for its issuance.

“A mere possibility or anything short of a reasonable probability of injury is insufficient to warrant an injunction against any proposed use of property by its owner. Injury, material and actual, not fancied or theoretical or merely possible, must be shown as the necessary or probable result of the action sought to be restrained. The disposition of the courts as well as of the legislative branch of the government in recent years has been to limit rather than to extend the use of the injunctive arm of the courts—to limit the use to cases where such use is necessary in order that real and substantial injury to rights or property of an imminent and probable character may be prevented.” *In re Penn. Dev. Co.*, 220 Fed. 225; *Loring v. Waldron* (Cal.) 31 Pac. 54.

Admitting for the moment that the action of the appellee in purchasing its own bonds at par or less from holders willing to sell in conflict with some provision of the contract between the parties, what property or right of the appellant is injured or invaded thereby?

It is admitted that appellant's security is measurably increased rather than impaired by such action, for, of course, the retirement of every bond from sources outside of the property pledged increases the proportion of the pledged property securing the bonds left unpaid. It does not change the maturity of appellant's bonds and, under the authority of cases cited by appellant, it will not be permitted to affect the chance of their retirement



under the sinking fund plan provided in the mortgage. If foreclosure of the trust mortgage should ever become necessary the action of the company in this regard could not operate to prefer any bondholder in the application of the property pledged. It is expressly admitted that the corporation is observing all of the terms of the sinking fund requirements and it is not contended that the corporation is insolvent or in dangerous financial condition.

Counsel do not contend that the provisions of section 29 of the trust mortgage place any obligation upon the appellee to invest its surplus funds in the retirement of its bonds under the plan thereby provided. If the appellee sees fit, it may devote such surplus funds to the payment of dividends, additions to, or betterment of its properties, or may expend the same in any other proper way it sees fit. Indeed, we get the impression from page 13 of the brief for appellant that it is admitted that the appellee might purchase its bonds and hold the same uncanceled in its treasury, and thus, in effect, accomplish by indirection what is now complained of.

It is impossible to point to any real right guaranteed the appellant under the terms of the contract in question which is invaded or impaired by the action of the appellee.

The only argument advanced by counsel is that if the appellee **should** seek to retire its bonds under the provisions of section 29 of the mortgage, there would be a **chance** that his bonds **might** be drawn in the lottery. It is not contended that the appellee is bound by any obligation to retire its bonds under the provision referred to,



nor is it even urged that there is any probability or likelihood of its doing so. Indeed, if the injunction which appellant seeks should issue, the reasonable probabilities are that the appellee will thereafter devote its surplus funds to the payment of dividends to its stockholders.

According to the allegations of the sixth paragraph of the bill of complaint, when the sinking fund aggregates a certain amount, the trustee is required to advertise for written proposals to sell to it outstanding bonds to be purchased with such moneys and if no bonds are then offered, or the purchase price of those offered is in excess of a stated price or does not consume the whole amount of such sinking fund, then the trustee is required to redeem with such sinking fund moneys, at the redemption price, such bonds as are determined by lot, so it appears that in case no bonds are offered in response to the advertisement for written proposals, or if the purchase price of those offered is in excess of a stated price, then only are the bonds to be redeemed determined by lot. It is inconceivable that if the appellee had placed the moneys used for purchase of bonds in the sinking fund and the trustee had then advertised for proposals to sell outstanding bonds, the bondholders who sold their bonds to the company for par or less would not have offered to sell them to the trustee for par or less. In such case appellant would have had no opportunity to have had his bonds drawn for redemption, and the same bonds would have been purchased and retired as were purchased and retired by appellee in the manner complained of by the appellant.

Appellant is, therefore, confronted with the situation

that no substantial right guaranteed him under the terms of the trust mortgage is being invaded by the appellee, and with the further fact that even though he obtain the full relief sought in this suit, there is only a remote possibility that he will ever profit thereby.

This situation, we contend, does not warrant the interposition of a court of equity. There are numerous authorities holding that injunction will not lie where no substantial right of complainant is invaded or where the alleged injury is doubtful or a matter of speculation.

Ruling Case Law 14, Injunctions, Article 57, states the rule as follows: "Where an injury is trivial equity will not ordinarily interfere by injunction, even in cases where the right has been established at law; but in order to justify such interposition the injury complained of must be substantial, and not merely technical or inconsequential. A mere apprehension of future injury is not enough to warrant the issuance of a permanent injunction; it must appear to the satisfaction of the court, that such apprehension is well grounded, that is a reasonable probability that a real injury, for which there is no adequate remedy at law, will occur if the injunction be not granted. If it is doubtful or contingent equity will not interfere by injunction."

To the same effect are:

Cyc. Vol. 22, pages 758-760.

I High on Injunctions, Articles 9 and 22.

I Spelling—Injunctions and other Extraordinary Remedies, Article 12.

The rule is well stated in the Indiana case of *Advance Oil Company v. Hunt*. 116 N. E. 343:

“Equity intervenes to prevent loss, to afford the most effective remedy, or to prevent a multiplicity of suits, but equitable relief is not granted to protect a naked right where there is no showing that the party seeking such relief has suffered or is about to suffer substantial loss or damage. \* \* \*

Equity will not intervene to prevent the invasion of a right where such invasion would only entitle the injured party to nominal damages, nor in cases where it is doubtful, or a matter of speculation, as to whether any damages will result to the complaining party. The basis of injunctive relief is threatened irreparable damage or inadequacy of the appropriate legal remedy.”

The following cases support the rule as laid down in the above case:

Dunn v. Yourmans (Ill.) 79 N. E. 323.

Gillespie Co. v. Fredericksburg Land Co. (Texas)  
168 S. W. 11.

Rhodes v. Dunbar (Pa.) 98 Am. Dec. 224.

Bigelow v. Hartford Bridge Co. (Conn.) 36 Am. Dec.  
502.

In re Linker, 222 Fed. 173.

Girard et al v. Lehigh Stone Co. (Ill.) 117 N. E. 698.

Tifft Co. v. State Medical Association (Wn.) 101  
Pac. 1081.

No contractual right of the appellant has been violated by the appellee in purchasing and retiring its bonds in the manner complained of. If the injunction prayed for were granted, appellee could place its surplus moneys in the sinking fund and have the trustee named in the mort-

gage purchase and retire its outstanding bonds as appellee has done in the past, without any necessity to determine by lot what bonds should be redeemed at 105%, so that it is almost a certainty that appellant would derive no benefit whatever from the issuance of the injunction. Under the authorities, courts of equity do not interfere to restrain the doing of an act from which there is a remote possibility of only a fancied or nominal damage to the party praying for the injunction.

For the foregoing reasons the decision of Judge Bourquin in refusing to issue an injunction pendente lite should be affirmed.

Respectfully submitted,

THOMAS M. KEARNEY,

Racine, Wisconsin.

W. J. JAMESON, JR., AND

JOHNSTON, COLEMAN & JOHNSTON,

Billings, Montana.

Counsel for Appellee.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

C. L. BOSS,

Appellant,

vs.

THE UNITED STATES OF AMERICA, BOSS &  
PEAKE AUTOMOBILE COMPANY, a Cor-  
poration, and E. W. A. PEAKE,  
Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Oregon.

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FILED  
APR 12 1923  
F. D. MONCKTON,  
CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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C. L. BOSS,

Appellant,

vs.

THE UNITED STATES OF AMERICA, BOSS &  
PEAKE AUTOMOBILE COMPANY, a Cor-  
poration, and E. W. A. PEAKE,

Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

JOHN F. LOGAN and ISHAM N. SMITH, Mohawk  
Building, Portland, Oregon,

For the Appellant and the Appellee Boss &  
Peake Automobile Company.

JOHN S. COKE, United States Attorney for the  
District of Oregon, and THOMAS H. MA-  
GUIRE, Assistant United States Attorney for  
the District of Oregon, Old Post Office Build-  
ing, Portland, Oregon,

For the Appellee, The United States of  
America.

JOHN F. REILLY, Platt Building, Portland, Ore-  
gon, and WINTER and MAGUIRE, Title and  
Trust Building, Portland, Oregon,  
For Appellee, E. W. A. Peake.

---

In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Citation on Appeal.**

United States of America,

District of Oregon,—ss.

To United States, Plaintiff and Appellee, E. W. A.

Peake, Defendant and Appellee, and Boss &

Peake Automobile Company, a Corporation,

Defendant and Appellee, GREETING:

WHEREAS C. L. Boss, defendant and appellant, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in favor of said United States and against said C. L. Boss and Boss & Peake Automobile Company, and also in favor of said E. W. A. Peake and against said C. L. Boss, and has given the security required by law:

YOU ARE, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why said decree should not be corrected and speedy justice should not be done the parties in that behalf. [1\*]

Given under my hand at Portland, in said district, this 2d day of February, in the year of our Lord one thousand nine hundred twenty-three.

CHAS. E. WOLVERTON,

Judge. [2]

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\*Page-number appearing at foot of page of original certified Transcript of Record.



United States of America,  
District of Oregon,—ss.

Due, legal and timely service is hereby accepted  
of the foregoing citation on appeal at Portland,  
Oregon, this 3d day of February, 1923.

THOS. H. MAGUIRE,

Asst. U. S. Atty.,

Attorney for Plaintiff,

JOHN F. REILLY and

WINTER and MAGUIRE,

Attorneys for E. W. A. Peake.

JOHN F. LOGAN,

ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Co. [3]

[Endorsed]: No. L—8786. 27—231. In the Dis-  
trict Court of the United States for the District of  
Oregon. United States, Plaintiff, vs. Boss & Peake  
Automobile Company, et alia, Defendants. Citation  
on Appeal. U. S. District Court, District of Oregon.  
Filed Feb. 3, 1923. G. H. Marsh, Clerk.

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In the District Court of the United States for the  
District of Oregon.

November Term, 1921.

BE IT REMEMBERED, That on the 16th day of  
January, 1922, there was duly filed in the District  
Court of the United States for the District of Ore-  
gon, an amended bill of complaint, in words and  
figures as follows, to wit: [4]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Amended Bill of Complaint.**

COMES NOW United States of America by Lester W. Humphreys, United States Attorney for the District of Oregon, and leave of Court first having been obtained presents this its bill of complaint against the defendant herein, and in that behalf plaintiff alleges:

**I.**

That on and prior to the 1st day of June, 1917, defendant Boss & Peake Automobile Company was a corporation organized for profit having capital stock represented by shares, and was duly incorporated under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Portland, Oregon.

**II.**

That during all of said times, the capital stock of the defendants Boss & Peake Automobile Company consisted of 300 shares, that the defendant C. L. Boss owned and held 149 shares of said capital

stock, and the defendant E. W. A. Peake owned and held 149 shares of said capital stock.

### III.

That the said defendant Boss & Peake Automobile Company, a corporation, during the period from January 1, 1917, to June 1, 1917, was a corporation subject to the payment of the tax imposed by the Revenue Act of 1917 and the Revenue Act of 1916. [5]

### IV.

That the entire net income of the said defendant Boss & Peake Automobile Company, a corporation, received by it from all sources during the time from January 1, 1917, to June 1, 1917, subject to the payment of such tax imposed by the provisions of said Revenue Act of 1917 and Revenue Act of 1916, was \$22,549.94, upon which said amount it was liable to pay to the said plaintiff excess profits tax in the sum of \$11,757.77 and in addition thereto taxes in the sum of \$647.53, making a total tax due of \$12,405.30.

### V.

That defendants have not paid said sum, nor any part thereof, except the sum of \$6,202.65, and there is now due, owing and unpaid to plaintiff the sum of \$6,202.65, with 5 per cent penalty amounting to \$310.13, and interest at one per cent per month from August 15th, 1920, on the sum of \$6,202.65.

### VI.

That during the month of June, 1917, defendant Boss & Peake Automobile Company, a corporation, dissolved and the assets of said defendant corpora-

tion were distributed to and received by the defendants C. L. Boss and E. W. A. Peake. Plaintiff is not informed of the exact amount received by each of said defendants in such distribution of assets, but such sums are well known to the defendants and each of them, and plaintiff alleges that the distributive share of each of the defendants, Boss & Peake so distributed to and received by them as aforesaid, was in excess of \$6,500.

#### VII.

That by reason of the aforesaid dissolution of the said corporation and the distribution of the assets thereof to the said defendants Boss & Peake, as aforesaid, the said corporation is and has been without assets from which plaintiff could collect the taxes due it. [6]

#### VIII.

That plaintiff has no plain, speedy, adequate and complete remedy of law, but only in equity to enforce the liability of the stockholders as hereinbefore alleged.

#### IX.

That demand has been made upon the defendants and each of them for the payment of the sums of money due as aforesaid, and that defendants and each of them have failed and refused to pay said sums.

WHEREFORE, plaintiff prays for a decree that it have and recover from the defendants, and each of them, the sum of \$6,202.65, with interest thereon at the rate of 1 per cent per month from August 15, 1920, together with 5 per cent penalty on said

sum of \$6,202.65, and the costs and disbursements of this suit, and for such other and further relief as to the Court may seem equitable.

LESTER W. HUMPHREYS,

United States Attorney for Oregon. [7]

United States of America,

District of Oregon,—ss.

I, Lester W. Humphreys, being first duly sworn, say:

That I am United States Attorney for the District of Oregon; that the facts set forth in the foregoing amended complaint are true as I verily believe; that I base this affidavit of verification upon reports submitted to me by the Bureau of Internal Revenue, Treasury Department of the United States of America.

LESTER W. HUMPHREYS.

Subscribed and sworn to before me this 14th day of January, 1922.

[Seal]

JOHN C. VEATCH,

Notary Public for Oregon.

My commission expires 11/14/24.

Served 14 Jan. 1922.

JOHN F. LOGAN,

Atty. for Boss & Peake Automobile Co. and C. L. Boss.

JOHN F. REILLY,

Atty. for E. W. A. Peake.

Filed January 16, 1922. G. H. Marsh, Clerk.



AND AFTERWARDS, to wit, on the 31st day of January, 1922, there was duly filed in said court an answer and cross-bill of Boss & Peake Automobile Company and C. L. Boss, in words and figures as follows, to wit: [9]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Answer and Cross-bill of Boss & Peake Automobile  
Company and C. L. Boss.**

Come now the Boss & Peake Automobile Company, a corporation, and C. L. Boss, individually, and answering the complaint of the United States of America, admit, deny and allege as follows, to wit:

I.

Admit that on and prior to the 1st day of June, 1917, the defendant Boss & Peake Automobile Company was a corporation, organized for profit having capital stock represented by shares, and was duly incorporated under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Portland.

## II.

That these answering defendants admit that at all of said times the capital stock of the defendant Boss & Peake Automobile Company consisted of 300 shares; that the defendant C. L. Boss owned and held 149 of said shares of said capital stock and that the defendant E. W. A. Peake owned and held 149 shares of said capital stock; in connection with the ownership of said capital stock, these answering defendants allege that at the time of the organization [10] of said corporation on November 8, 1916, W. H. Bietau subscribed for 2 shares of the capital stock of said corporation and that during the month of March, 1917, the said 2 shares owned by the said W. H. Bietau were divided so that thereafter, and during the life of said corporation, and until June 1, 1917, 1 of said shares was held in the name of W. H. Bietau and one share was held in the name of R. E. Murphy; that in truth and in fact the said corporation was so organized as to be controlled equally, share and share alike, between this answering defendant, C. L. Boss, and the defendant, E. W. A. Peake, and that the shares of stock held by W. H. Bietau and R. E. Murphy were held for qualifying and voting purposes only.

## III.

Admit that said defendant Boss & Peake Automobile Company, a corporation, during the period from January 1, 1917, to June 1, 1917, was a corporation subject to the payment of the tax imposed by

the Revenue Act of 1917 and the Revenue Act of 1916.

#### IV.

Admit that the entire net income of the said defendant Boss & Peake Automobile Company, a corporation, received by it from all sources during the time from January 1, 1917, to June 1, 1917, subject to the payment of such tax imposed by the provisions of said Revenue Act of 1917 and Revenue Act of 1916, was \$22,549.94, upon which said amount it was liable to pay to the said plaintiff excess profits tax in the sum of \$11,757.77 and in addition thereto taxes in the sum of \$647.53, making a total tax due of \$12,405.30. [11]

#### V.

Admit that the defendants have not paid said sum, nor any part thereof, except the sum of \$6,202.65, which was paid by the defendant C. L. Boss and these answering defendants admit that there is now due, owing and unpaid to the plaintiff the sum of \$6,202.65, with interest at the rate of one-half of 1 per cent per month from August 15, 1920, on the sum of \$6,202.65, but whether there should be a penalty of 5 per cent, amounting to \$310.13, or any part thereof, or whether there should be interest charged in excess of one-half of 1 per cent per month from August 15, 1920, these answering defendants have no knowledge or information sufficient to form a belief and therefore as to this matter deny the same upon the ground and for the reason that these answering defendants have always acted in good faith, without negligence, and with a wish to pay what-

ever sums were due the Government under the circumstances and the law applicable thereto.

VI.

Admit that during the month of June, 1917, the defendant Boss & Peake Automobile Company dissolved, and the assets of said corporation were distributed to and received by the defendant C. L. Boss and the defendant E. W. A. Peake; that the said assets were divided, share and share alike, between the defendant C. L. Boss and the defendant E. W. A. Peake, as is more fully set out in the separate answer and defense and cross-bill as between the said defendant C. L. Boss and the defendant E. W. A. Peake, hereinafter in this answer set out, annexed and made a part hereof; defendants further admit that the distributive [12] share of each of the defendants C. L. Boss and E. W. A. Peake was in excess of \$6,500.00.

VII.

Admit that by the aforesaid dissolution of the said corporation and the distribution of the assets thereof to the said defendants C. L. Boss and E. W. A. Peake, the said corporation is and has been without assets from which the plaintiff could collect the taxes due it.

VIII.

Admit that the plaintiff has no plain, speedy, adequate and complete remedy at law, but only in equity to enforce the liability of the stockholders as herein alleged.

IX.

Admit that demand has been made upon the de-



defendants, and each of them, for the payment of the sums of money alleged to be due in the amended complaint herein, as aforesaid, and admit that the defendant E. W. A. Peake has failed and refused to pay said sums or any part thereof but deny that this answering defendant, C. L. Boss has refused to pay said sums and alleges that the said C. L. Boss has paid the full sum of \$6,202.65, as is more fully set out in the separate answer and defense and cross-bill as between the said defendant C. L. Boss and the defendant E. W. A. Peake as herein-after in this answer set out, annexed and made a part hereof; in this connection these answering defendants allege that the balance of \$6,202.65 with such penalty and interest as is chargeable in law, is properly due from and chargeable to the defendant E. W. A. Peake and further in this connection these answering defendants allege that the defendant, E. W. A. [13] Peake is a man of property and well able to respond to a judgment obtained by plaintiff.

The defendants Boss & Peake Automobile Company, a corporation, and C. L. Boss, individually, by way of a separate answer and defense and as and for a cross-bill and cross-complaint against the defendant E. W. A. Peake, individually, in accordance with the equity rules of this Court, allege:

I.

That prior to November 8, 1916, the defendant C. L. Boss, was engaged in the automobile business in the City of Portland, State of Oregon, as one of the members of a partnership known and desig-



nated as C. L. Boss & Company, which partnership was composed of C. L. Boss, Oscar J. Closset and the late Joseph Closset, deceased; that the business, pursuit and occupation of said partnership of C. L. Boss & Company was the purchase and sale of automobiles with its office in the City of Portland, State of Oregon.

## II.

That on or about November 6, 1916, there was organized, under and by virtue of the laws of the State of Oregon, a corporation as shown by the certificate of the Corporation Commissioner of the State of Oregon, dated November 8, 1916, which corporation was known and designated as the Boss & Peake Automobile Company; that the defendant C. L. Boss and the defendant E. W. A. Peake and one, [14] W. H. Bietau, were the incorporators of such corporation and complied with all the laws of the State of Oregon with reference to the organization of domestic corporations; that stock subscriptions were opened for the capital stock of said corporation on November 8, 1916, and that thereupon the defendant C. L. Boss subscribed to 149 shares at a par value of \$14,900.00 and the defendant E. W. A. Peake subscribed to 149 shares at a par value of \$14,900.00 and that the said W. H. Bietau subscribed to 2 shares at a par value of \$200.00; the entire capital stock of said corporation was 300 shares, each share being of the par value of \$100.00.

## III.

That the said defendant corporation Boss &

Peake Automobile Company, which is the same corporation designated as one of the defendants herein, continued in operation as a corporation from November 25, 1916, to June 1, 1917; that as soon as said corporation was organized the corporate stock of said corporation was divided as follows:

The defendant C. L. Boss 149 shares.

The defendant E. W. A. Peake 149 shares.

That during the month of March, 1917, the 2 shares owned by W. H. Bietau were divided so that the shares were thereafter held during the life of said corporation and until June 1, 1917, as follows:

1 share in the name of W. H. Bietau and 1 share in the name of R. E. Murphy; that in truth and in fact the said corporation was so organized as to be controlled equally, share and share alike, by the defendant C. L. Boss and the defendant E. W. A. Peake, and that the shares of stock held by [15] W. H. Bietau and R. E. Murphy were held for voting and qualifying purposes only.

#### IV.

That at the outbreak of the great war in 1917 the said E. W. A. Peake became alarmed as to the future of the automobile business and particularly as to the financial market condition of such business and thereafter, and particularly after the month of March, 1917, until the 31st day of May, 1917, the said defendant E. W. A. Peake sought to bring about a dissolution or liquidation of the said defendant corporation Boss & Peake Automobile Company; that the business affairs of said corporation were conducted in such a way after January

1, 1917, that each one of said defendants C. L. Boss and E. W. A. Peake could tell at any time what the earnings were, based upon satisfactory estimated statements continuously brought down to date showing cost, overhead charges and a satisfactory estimated profit; that after the declaration of war by the United States, the defendant E. W. A. Peake, continued to view with alarm the future and thereafter, among other things, proposed a dissolution of said defendant corporation Boss & Peake Automobile Company by dividing the property of said defendant corporation between the defendant C. L. Boss and the defendant E. W. A. Peake, share and share alike.

#### V.

That on the 23d day of May, 1917, the defendant E. W. A. Peake made definite proposals to divide the properties of the corporation according to his 50 per cent interest by taking over one-half of the properties in kind or moneys worth; that on the 31st day of May, 1917, the properties and assets of the said defendant corporation Boss & Peake Automobile [16] Company, were by agreement between the defendant C. L. Boss and the defendant E. W. A. Peake, divided and it was then agreed that the said defendant corporation Boss & Peake Automobile Company should be at once dissolved.

#### VI.

That thereafter on the next day, June 1, 1917, a copartnership was formed between the defendant C. L. Boss and R. J. McRell, which copartnership then and thereafter and ever since has been known

and designated as the C. L. Boss Automobile Company and the said defendant corporation Boss & Peake Automobile Company was dissolved and ceased to do business from and after the month of June, 1917; that on the said 1st day of June, 1917, the said defendant E. W. A. Peake received his 50 per cent interest of the properties and assets of said defendant corporation Boss & Peake Automobile Company, in property, security and moneys, amounting to \$26,083.65, being one-half of the value of the physical properties and assets of the said defendant corporation Boss & Peake Automobile Company; that on said date the said defendant E. W. A. Peake recognized the existence of the said copartnership of C. L. Boss Automobile Company by dealing with it and receiving contract assurances from it and by dealing with it as a new firm and the successor of the defendant corporation Boss & Peake Automobile Company; that in particular the said defendant E. W. A. Peake on June 1, 1917, loaned money to the said copartnership C. L. Boss Automobile Company, and took from the said copartnership, as security for said loan, the identical automobiles theretofore and prior to the 31st day of May, 1917, the property of the defendant corporation Boss & Peake Automobile Company. [17]

## VII.

That on June 1, 1917, the said defendant corporation Boss & Peake Automobile Company, in accordance with the agreement theretofore made between the defendant C. L. Boss and the defend-



ant E. W. A. Peake, and in accordance with the copartnership agreement between the defendant C. L. Boss and R. J. McRell, the said Boss & Peake Automobile Company ceased doing business as a going concern and during the month of June, 1917, the said Boss & Peake Automobile Company, a corporation, prepared papers of dissolution in accordance with the laws of the State of Oregon; and particularly, on June 22, 1917, a resolution of dissolution, in accordance with Section 6701, L. O. L., was duly and regularly adopted and thereafter, in due course, on July 17, 1917, a certificate of dissolution was issued out of and under the seal of the Corporation Commissioner of the State of Oregon.

### VIII.

That from and after June 1, 1917, the said copartnership, C. L. Boss Automobile Company, did business as a copartnership and a separate business entity and that from and after June 1, 1917, the said copartnership of C. L. Boss Automobile Company made return to the Government of the United States under the Revenue Act of 1917, and that ever since said date the copartnership of C. L. Boss Automobile Company has made return to the Government of the United States of its activities as such copartnership and the proper officers of the United States Government have ever since June 1, 1917, made audit of said copartnership, C. L. Boss Automobile Company, beginning June 1, 1917; that the said defendant corporation Boss & Peake Automobile Company [18] continued as a corporation



until June 1, 1917, when it was succeeded on the same day by the said C. L. Boss Automobile Company.

### IX.

That on June 1, 1917, the defendant E. W. A. Peake, according to previous agreement, did business with the copartnership C. L. Boss Automobile Company and the defendant E. W. A. Peake well knew at that time that the said C. L. Boss Automobile Company was to start in business at the liquidation of the defendant corporation Boss & Peake Automobile Company, to wit: on June 1, 1917, and the said defendant E. W. A. Peake did recognize on said last named date the existence of the copartnership C. L. Boss Automobile Company and the nonexistence of the defendant corporation Boss & Peake Automobile Company, by accepting the notes of the said copartnership C. L. Boss Automobile Company.

### X.

That at the time of the agreement between the defendant C. L. Boss and the defendant E. W. A. Peake for the liquidation of the defendant corporation Boss & Peake Automobile Company, neither party had in contemplation the Revenue Act of 1917, and particularly neither party had contemplated the retroactive effect of said Revenue Act; that the claimed liability of said defendant corporation Boss & Peake Automobile Company, or of the individual defendants C. L. Boss or E. W. A. Peake, did not come to the notice of any of them until apprised by notice from the proper author-

ities of the United States some time thereafter; that later on the defendant C. L. Boss, in accordance with notice from the United States Internal Revenue Service, tendered to the Government one-half of the \$12,405.30 as soon as the definite sum was ascertained; that [19] on August 17, 1920, the defendant C. L. Boss paid to the United States Internal Revenue Service at the office of the Collector, the full sum of \$6,202.65, being the proper charge as of date August 17, 1920; that this payment was made upon the claim of the defendant C. L. Boss, that under the Revenue Act of 1917, he, the said C. L. Boss, was responsible as the owner of one-half of the physical properties of the said corporation defendant, Boss & Peake Automobile Company at the time said assets were divided and the said corporation ceased to do business and was dissolved, and that the balance due on said income tax of \$12,405.30, together with interest and penalty, if any there be, should properly be chargeable to the individual defendant E. W. A. Peake.

WHEREFORE these answering defendants having fully answered plaintiff's complaint pray a decree of this Court as follows:

1. That the bill of complaint as against these answering defendants be dismissed.

2. That as between the defendant C. L. Boss and the defendant E. W. A. Peake the said C. L. Boss be decreed and adjudged to have individually paid as of August 20, 1920, the full sum due from the said C. L. Boss to the plaintiff as stockholder and officer of the said Boss & Peake Automobile Com-

pany under the Revenue Act of 1916 and/or the Revenue Act of 1917.

3. That as between these answering defendants and the defendant E. W. A. Peake, the said defendant E. W. A. Peake should be held, decreed and adjudged to be the party liable to the plaintiff for any delinquent income tax in the Revenue Act of 1916 and/or the Revenue Act of 1917. [20]

4. For such other and further relief as to the Court may seem meet, and just, and equitable.

JOHN F. LOGAN,

Attorney for Boss & Peake Automobile Company  
and C. L. Boss.

State of Oregon,

County of Multnomah,—ss.

I, C. L. Boss, being first duly sworn, say that I am one of the defendants in the within entitled cause, and that the foregoing answer is true as I verily believe.

C. L. BOSS.

Subscribed and sworn to before me, this 31st day of January, 1922.

[Seal]

JOHN F. LOGAN,

Notary Public for Oregon.

My commission expires 5 December, 1923.

Service admitted Portland, Ore., January 31, 1922.

JOHN F. REILLY,

Attorney for Deft. Peake.

JOHN C. VEATCH,

Assistant U. S. Attorney.

Filed January 31, 1922. G. H. Marsh, Clerk.

[21]

---

AND AFTERWARDS, to wit, on the 6th day of February, 1922, there was duly filed in said court an answer of E. W. A. Peake to amended bill of complaint, in words and figures as follows, to wit: [22]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Answer of E. W. A. Peake to Amended Bill of  
Complaint.**

Comes now the defendant E. W. A. Peake by John F. Reilly and Winter & Maguire, his attorneys, and for answer to plaintiff's amended bill of complaint admits, denies and alleges as follows:

I.

Admits each and every allegation of paragraphs I, II and III.

II.

This answering defendant alleges that he has not knowledge or information sufficient to form a



belief as to the truth of the allegation in paragraph IV that the net income of the defendant Boss & Peake Automobile Company from January 1st, 1917, to June 1st, 1917, was the sum of \$22,549.94, and therefore denies the same; and upon the same grounds and for the same reason this answering defendant denies that the said corporation was liable to pay a tax of \$12,405.30 or any part thereof.

### III.

Answering paragraph V this answering defendant admits that he has not paid any part of said sum of \$12,405.30, and alleges that he has no knowledge or information sufficient to form a belief as to whether either of the other defendants have paid all or any part of said sum, and therefore denies that either of the other defendants [23] has not paid said sum or any part thereof, and this answering defendant further denies that there is now due and owing to plaintiff the sum of \$6,202.65 or any part thereof.

### IV.

Denies that the defendant corporation was dissolved during the month of June, 1917, and denies that any part of the assets of said corporation were distributed to or were received by this defendant E. W. A. Peake.

### V.

Denies that any part or portion of the assets of the defendant corporation were distributed to or were received by this answering defendant, and this answering defendant alleges that he has not knowledge or information sufficient to form a belief



and therefore denies that the Boss & Peake Automobile Company is without sufficient assets from which plaintiff could collect such taxes as may be legally due it.

VI.

Admits each and every allegation of paragraph VIII.

VII.

Denies that any demand has been made upon this answering defendant for the payment of any sums of money whatsoever by the plaintiff.

WHEREFORE this answering defendant prays that so far as he is concerned the plaintiff take nothing by its suit and that he may have and recover of plaintiff his costs and disbursements herein incurred, and that he may have such other and further relief as may to the Court seem equitable and proper.

(Signed) WINTER & MAGUIRE,

(Signed) JOHN F. REILLY,

Solicitors for Defendant E. W. A. Peake. [24]

United States of America,

District of Oregon,—ss.

I, E. W. A. Peake, being first duly sworn on oath, depose and say that I am one of the defendants in the above-entitled suit; that I have read the foregoing answer and know the contents thereof, and that the same is true except as to matters therein stated on information and belief and as to those matters I believe them true.

(Signed) E. W. A. PEAKE.

Subscribed and sworn to before me this 6 day of February, 1922.

[Notarial Seal] (Signed) JOHN F. REILLY,  
Notary Public for Oregon.

My commission expires 6/16/22.

State of Oregon,  
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this — day of February, 1922, by receiving a copy thereof, duly certified to as such by John F. Reilly, attorney for defendant E. W. A. Peake.

(Signed) LESTER W. HUMPHREYS,  
Attorney for Plaintiff.

(Signed) JOHN F. LOGAN,  
By F. O'CONNELL,  
Atty. for C. L. Boss and Boss & Peake Automobile  
Co.

Filed Feb. 6, 1922. G. H. Marsh, Clerk. [25]

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AND AFTERWARDS, to wit, on the 6th day of February, 1922, there was duly filed in said Court an answer of E. W. A. Peake to cross-bill of Boss & Peake Automobile Company and C. L. Boss, in words and figures as follows, to wit: [26]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Answer of E. W. A. Peake to Cross-bill of Boss &  
Peake Automobile Company and C. L. Boss.**

Comes now the defendant E. W. A. Peake by  
Messrs. John F. Reilly and Winter & Maguire, his  
solicitors of record, and for answer to the cross-  
bill of the defendants Boss & Peake Automobile  
Company and C. L. Boss admits, denies and al-  
leges as follows:

I.

Admits each and every allegation of paragraphs  
I and II.

II.

Admits that the defendant corporation continued  
in operation from November 25th, 1916, until long  
after June 1st, 1917, and denies that said corpora-  
tion stopped operations on June 1st, 1917; admits  
that at the time of the organization of said corpora-  
tion the capital stock thereof was divided so that  
the defendant C. L. Boss owned 149 shares and  
the defendant E. W. A. Peake owned 149 shares,

and that two shares stood in the name of W. H. Bietau; admits that in March, 1917, the two shares standing in the name of W. H. Bietau were divided, so that one share thereof stood in the name of R. E. Murphy, but denies that said stock or any part thereof remained in the name of or was owned by E. W. A. Peake or W. H. Bietau during the whole life of said corporation, and alleges that on and after June 1st, 1917, the said stock was thereafter owned and purchased by defendant C. L. Boss. [27]

### III.

Denies that at the outbreak of the great war of 1917 or at any time between the first day of January, 1917, and the first day of June of said year this defendant became alarmed as to the future of the automobile business and particularly as to the financial market condition of said business, and denies that thereafter and particularly after the month of March, 1917, this defendant sought to bring about a dissolution or liquidation of the said defendant corporation, the Boss & Peake Automobile Company, and further denies that the business affairs of said corporation were conducted in such a way after January 1st, 1917, that either of the defendants C. L. Boss and E. W. A. Peake could tell at any time what the value of its assets or what its earnings were, and denies specifically that satisfactory or other estimated statements were continuously or at all brought down to date showing costs, overhead charges and satisfactory or otherwise estimated profits, or any one or more of said

items, and denies that after the declaration of war by the United States this defendant viewed or continued to view with alarm the future or proposed the dissolution of said defendant corporation Boss & Peake Automobile Company by the division of the property thereof between this defendant and the defendant C. L. Boss share and share alike or in any other manner whatsoever.

IV.

Denies that on the 23d day of May, 1917, or at all the defendant E. W. A. Peake made definite or other proposals to divide the property of the defendant corporation according to his 50 per cent interest by taking one-half or over one-half of the properties in kind or money's worth, or upon any other basis or division whatsoever; denies that on the 31st day of May, 1917, or at all, the properties or assets of said defendant corporation Boss & Peake Automobile Company were by agreement or otherwise divided between the defendant C. L. Boss and defendant E. W. A. Peake, and further denies that it was then and [28] there or at all agreed that the defendant corporation Boss & Peake Automobile Company should at once be dissolved.

V.

This answering defendant has not knowledge or information sufficient to form a belief, and therefore denies that on June 1st, 1917, that a copartnership was formed between the defendant C. L. Boss and R. J. McRell known and designated as the C. L. Boss Automobile Company, and denies that the defendant Boss & Peake Automobile Com-



pany was dissolved and ceased to do business from the month of June, 1917, but admits that said corporation was dissolved and ceased to do business on July 17th, 1917, and denies that on the 1st day of June, 1917, or at all, the defendant E. W. A. Peake received his 50 per cent or other interest of the property and assets of the said defendant corporation in property, money and securities amounting to \$26,083.65 or at all, or any other sum, and denies that on the 1st day of June, 1917, or at all during the month of June, 1917, this defendant recognized the existence of the copartnership C. L. Boss Automobile Company by dealing with it or receiving contracts and assurances from it or by dealing with it as a new firm or by dealing with it as the successor of the defendant corporation Boss & Peake Automobile Company, or at all; denies that this defendant on June 1st, 1917, or at all, loaned money to said copartnership C. L. Boss Automobile Company and or took from said copartnership as security for any loan automobiles theretofore and prior to the 31st day of May, 1917, the property of the defendant corporation Boss & Peake Automobile Company.

## VI.

Admits that on the 22d day of June, 1917, a resolution was adopted by the stockholders of the defendant Boss & Peake Automobile Company and that on July 17th, 1917, a certificate of dissolution was issued out of and under the seal of the Corporation Commissioner of the State of Oregon, and denies that the Boss & Peake Automobile [29]

Company was dissolved in accordance with any agreement between the defendant C. L. Boss and this defendant, and denies that said corporation ceased doing business as a going concern on the 1st day of June, 1917, or at any time prior to the 17th day of July, 1917.

## VII.

This answering defendant has not knowledge or information sufficient to form a belief, and therefore denies that from and after the 1st day of June, 1917 a copartnership known and designated as the C. L. Boss Automobile Company did business as a copartnership and a separate business entity, and denies that the said copartnership from and after the first day of June, 1917, made a return to the Government of the United States under the Revenue Act of 1917, and denies that ever since said date the said copartnership made returns to the Government of the United States of its activities as such copartnership, and that the proper officers of the United States have ever since the 1st day of June, 1917, made audit of said copartnership, and denies that the Boss & Peake Automobile Company on June 1st, 1917, was succeeded on said date by the said C. L. Boss Automobile Company.

## VIII.

Denies that the defendant E. W. A. Peake or at all on June 1st, 1917, did business with the said copartnership C. L. Boss Automobile Company; denies that this defendant knew on June 1st, 1917, that the said copartnership C. L. Boss Automobile Company was to start in business at the liquidation

of defendant corporation Boss & Peake Automobile Company on June 1st, 1917; and denies that on the 1st day of June, 1917, this defendant recognized the nonexistence of the defendant corporation Boss & Peake Automobile Company by accepting the notes of the copartnership C. L. Boss Automobile Company or at all.

### IX.

Admits that this defendant on June 1st, 1917, did not have in contemplation the passage of the Revenue Act of 1917, and that [30] this defendant did not contemplate the retroactive effect of any such revenue act; denies that the defendant C. L. Boss did not have notice and knowledge of the defendant corporation and of C. L. Boss as the distributee of the assets and property thereof until he was advised thereof by the property authorities of the United States Government; and denies that the defendant C. L. Boss tendered to the Government one-half of the sum of \$12,405.30 or any part thereof; and this answering defendant has not knowledge or information sufficient to form a belief and therefore denies that any payment was made by the defendant C. L. Boss to the Government of the United States under the Revenue Act of 1917 upon claims that the said C. L. Boss was responsible as owner of one-half of the physical properties of said corporation or on any other basis, and denies that any part or portion of any income tax of said corporation for the year 1917 with any interest or penalty thereto should be legally or properly chargeable to this answering defendant.

And for a further and separate answer to the cross-bill of the defendants C. L. Boss and Boss & Peake Automobile Company this answering defendant alleges as follows:

I.

That on and prior to the 31st day of May, 1917, this answering defendant was the owner of one-half of the capital stock of the defendant Boss & Peake Automobile Company; that on the 1st day of June, 1917, this defendant sold all of his capital stock in said corporation to the defendant C. L. Boss, and that from and after the 1st day of June, 1917, this defendant has had no interest in said capital stock or in the assets or physical properties of said corporation, and that on the 1st day of June, 1917, the capital stock of this defendant was transferred from his name to C. L. Boss and divers other persons to this defendant unknown but at the instance of the said defendant C. L. Boss. [31]

WHEREFORE, having fully answered the cross-bill of the defendants C. L. Boss and Boss & Peake Automobile Company, this answering defendant prays that they take nothing by their cross-bill and that the defendant C. L. Boss and the defendant Boss & Peake Automobile Company and the plaintiff United States of America take no decree against this answering defendant, and that this Court decree that any tax which may be found due and payable to the plaintiff from the defendant corporation be paid by the defendant C. L. Boss and by said corporation, and that this answering defendant have and recover of the defendants C. L. Boss and Boss & Peake Automobile Company his costs and



disbursements herein incurred, and that he have such other and further relief in the premises as may to the Court seem equitable and proper.

(Signed) WINTER & MAGUIRE,

(Signed) JOHN F. REILLY,

Solicitors for Defendant E. W. A. Peake.

State of Oregon,

County of Multnomah,—ss.

I, E. W. A. Peake, being first duly sworn, depose and say that I am one of the defendants in the above-entitled suit; and that the foregoing answer to cross-bill is true as I verily believe.

(Signed) E. W. A. PEAKE.

Subscribed and sworn to before me this 6th day of February, 1922.

[Notarial Seal] (Signed) JOHN F. REILLY.

Notary Public for the State of Oregon.

My commission expires 6/16/22.

State of Oregon,

County of Multnomah,—ss.

Due service of the within answer of defendant E. W. A. Peake [32] to cross-bill is hereby accepted in Multnomah County, Oregon, this — day of February, 1922, by receiving a copy thereof, duly certified to as such by John F. Reilly, attorney for Defendant E. W. A. Peake.

(Signed) LESTER W. HUMPHREYS,

Attorney for Plaintiff.

(Signed) JOHN F. LOGAN,

By FLORA O'CONNELL,

Atty. for C. L. Boss and Boss & Peake Automobile Co.



Filed Feb. 6, 1922. G. H. Marsh, Clerk. [33]

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AND AFTERWARDS, to wit, on the 22d day of May, 1922, there was duly filed in said court a reply of defendants Boss & Peake Automobile Company and C. L. Boss to answer of E. W. A. Peake to cross-bill, in words and figures as follows, to wit: [34]

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In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Reply of Boss & Peake Automobile Company and  
C. L. Boss to Answer of E. W. A. Peake to  
Cross-bill.**

Come now the defendants Boss & Peake Automobile Company and C. L. Boss, individually, and replying to the new matter in the further and separate answer to the cross-bill of these defendants, admit, deny and allege as follows, to wit:

## I.

Admit that on and prior to the 31st day of May, 1917, the defendant E. W. A. Peake was the owner of one-half of the capital stock of the defendant Boss & Peake Automobile Company; deny that on the 1st day of June, 1917, the said defendant E. W. A. Peake sold all his capital stock in said corporation to the defendant C. L. Boss or that after the 1st day of June, 1917, the said E. W. A. Peake had no interest in said capital stock or in the assets or physical properties of said corporation or that on the 1st day of June, 1917, the capital stock of said defendant E. W. A. Peake was transferred from his name to C. L. Boss or divers other persons, save and except as the transfer of said capital stock was involved in the division of the physical assets of said corporation as set out in the cross-bill of the defendants Boss & Peake Automobile Company and C. L. Boss. [35]

WHEREFORE these replying defendants, having fully replied to the separate answer and defense of the defendant E. W. A. Peake, pray for the relief prayed for in the cross-bill.

JOHN F. LOGAN,  
Attorney for Defendants Boss & Peake Automobile  
Company and C. L. Boss.

State of Oregon,  
County of Multnomah,—ss.

I, C. L. Boss, being first duly sworn, say that I am one of the defendants in the within entitled

cause, and that the foregoing reply is true as I verily believe.

C. L. BOSS.

Subscribed and sworn to before me this 8th day of February, 1922.

[Seal]

JOHN F. LOGAN,  
Notary Public for Oregon.

My commission expires 5 Dec. 1923.

Service admitted Portland, Ore., Feb., 1922.

JOHN F. REILLY,  
Of Attys. for E. W. A. Peake.

Filed May 22, 1922. G. H. Marsh, Clerk. [36]

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AND AFTERWARDS, to wit, on the 11th day of December, 1922, there was duly filed in said court an opinion, in words and figures as follows, to wit: [37]

In the District Court of the United States for the District of Oregon.

No. L—8786.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Opinion.**

December 11, 1922.

LESTER W. HUMPHREYS, U. S. Attorney;

CARL A. MAPES, Solicitor of Internal Revenue,  
C. A. GWINN, Attorney, Treasury Department, of Counsel;

JOHN F. LOGAN and ISHAM N. SMITH, for Defendant Boss;

WINTER & MAGUIRE and JOHN F. REILLY,  
for Defendant Peake.

WOLVERTON, District Judge:

This is a suit in behalf of the General Government to recover one-half of the income tax assessed against the defendants Boss and Peake, as the shareholders in equal division of the Boss & Peake Automobile Company, a dissolved corporation. One-half of the tax, namely, \$6,202.65, has been paid by the defendant Boss, and the other half remains due and unpaid. Boss, while not denying liability, claims that he has paid his full share of the tax, and that Peake should be required to pay the amount remaining due. Peake denies liability, on the ground that he was not a stockholder at the time of dissolution of the corporation; claiming that prior to dissolution he sold his entire stock to Boss, and that therefore Boss, being the owner of all the stock, should respond in payment of the entire tax.

[38]

The cause can be disposed of with greater clarity by first ascertaining whether, as between Boss and Peake, the latter is liable; and, second, as between Peake and the Government, whether he is liable with Boss for the payment of the tax.

The Boss & Peake Automobile Company was organized and incorporated on November 8, 1916, with a capital stock of \$30,000, divided into 300 shares of \$100 each. Of these shares Boss subscribed 149, Peake 149, and W. H. Bietau 2. Subsequently Bietau assigned one of her shares to R. E. Murphy. Bietau was the secretary of Peake, and Murphy became the bookkeeper for the corporation. These two were, however, mere holding stockholders, for giving voice at the meetings of stockholders and directors; the real ownership being in Boss, 1 share, and Peake, 1 share. In reality, Boss and Peake were equal owners of the capital stock, each owning 150 shares, and each having paid into the concern as capital investment the full par value of his stock.

The corporation at once entered upon the business for which it was organized, and so continued to June 1, 1917, when, or shortly thereafter, its assets were taken over by C. L. Boss Automobile Company. An income tax of \$12,405.30 was levied upon the earnings of the company from January 1 to June 1, 1917; the earnings being appraised at \$22,549.94.

On or about May 21, 1917, Boss and Peake had an understanding between them, by which Peake was to dispose of his interest in the corporation to



Boss, and the crucial inquiry as between them is, whether the agreement was for a sale of Peake's stock to Boss, or for a dissolution of the corporation and a division of the assets of the concern. [39]

Peake maintains that it was for a sale, pure and simple, and Boss that it was for a dissolution, with division of the assets.

The parties were business men, were keenly alive to the promotion of the enterprise, and kept fairly in mind the probable earnings of their investment as the business proceeded. In their relative lines of work, Boss was concerned more in the purchase of cars from the manufacturers and the disposal of them in the field, and Peake with the arrangement of finances with which to conduct the business. Boss asserts that the matter of dissolution and division of assets was early a subject of discussion, and even at the time of forming the corporation, and that it was understood that the investments should be so managed and the business so ordered that such a settlement could at any time be readily arrived at; that in March, 1917, Peake made an offer to sell his stock, which was accepted by him (Boss), and that a paper was drawn up for effectuating the sale, but that Peake declined to sign it. The paper alluded to is in evidence, and is in the nature of an option for the sale of the stock upon an inventory basis; Boss to pay Peake 50 per cent of the inventory value of the assets.

Boss further testifies that he and Peake had a conversation at the central depot in Portland rela-

tive to a dissolution of the corporation, and a distribution of the assets between them. McCornack, the field manager of the Hudson Motor Car Company, had been in the city a short time, and had been in communication with Boss, but not with Peake. Boss and Peake were in rivalry as to which of them should be favored in getting the agency for handling the Hudson car. McCornack was about to leave the city, and had gone to the depot to take the train. Boss and McRell were with him. Peake, learning that McCornack was leaving, went to the depot [40] to see him, and there had a short conversation with him, in which McCornack gave him to understand that he preferred to deal with Boss. Boss further relates that, immediately upon McCornack's taking the train, he (Boss) turned to Peake and remarked that "he was blocking our distribution, our dissolution and distribution again, \* \* \* by taking the cash of the corporation and putting it in notes that the bank was carrying"; that thereupon Peake said to him, "I will take notes title notes on all the new Hudson cars, so that the distribution and dissolution can be completed. I will take the physical assets. I will take the automobiles of the corporation, and sell them to you boys, and take the title note, and loan you boys the money on the very automobiles, so that the dissolution and distribution can be completed. \* \* \* In doing so I must have my salary, I must have my capital, and I must have my net profit, which I estimate—the net profit I estimate to be \$20,000," after allowing over \$2,000 for profit and loss on the

notes that were indorsed, the service on the cars that were out, and the incidental bills that were not in; and that this proposition as made by Peake was accepted by him (Boss), to take effect as of June 1st. This was May 21, 22 or 23. Boss further explains that, before meeting at the depot, the record was brought up, and showed a little over \$22,000 profit, and that, after deducting the profit and loss on accounts unsettled, would leave approximately \$20,000, one-half of which, namely, \$10,000, would be Peake's share of the net profits, and that the amount claimed by Peake totaled \$26,137, which included some chairs and a desk which belonged to him, individually. Further on, Boss says that "There was no capital stock ever sold. The capital stock was indorsed, at my request, as a means or a way. When we were down there, he made a proposition of dissolving and distributing, either in cash or kind, and his [41] proposition was accepted"; that in the transfer, he (Boss) was to take the liabilities, but that as to the tax liability, he did not assume that, because it was not known, and was not a current liability.

R. J. McRell testified, respecting the conversation at the depot, that "Mr. Boss turned to Mr. Peake, and said that he was blocking the dissolution of the Boss & Peake Automobile Company, and Mr. Peake asked him how that was. And he said that he had taken the money of the corporation and had put it into automobile notes; in other words, had used up the funds. \* \* \* And Mr. Peake came back at him very quickly, and said that he would take the

notes of the C. L. Boss Automobile Company; that is, he would loan money to the C. L. Boss Automobile Company, and take the new automobiles that was controlled by the Boss & Peake Automobile Company \* \* \* as security for the loan,—as I recall, there were eight automobiles,—these eight Hudson automobiles, to apply on this loan. And he said that he must have his salary in the deal, and he must have his capital, and he must have his profit. \* \* \* They estimated, as I recall, their profits at \$20,000; and the division of the two, of course, would be \$10,000, divided between the two, that would be the division of profits”; that Boss accepted the proposition “very quickly right there,” and that on June 1st, at the First National Bank, the deal was completed.

This is Boss’ rendition of the nature of the agreement growing out of the conversation at the depot.

Peake testifies, touching the transaction there had, that, before McCornack had departed, he called Boss off to one side, away from both McCornack and McRell, so they could talk privately; and “I asked—Mr. Boss’ intention was to make me a [42] proposition to go out on July 1st; and I asked Mr. Boss if he would be able to get his money together by June 1st. He said he would. Well, I says, ‘I will make you a price then. I will make you a price of \$25,000 for the stock,’ and I would expect the salary credit to be paid. Mr. Boss says, ‘That is perfectly satisfactory.’ And we left at that, and that was all the conversation, and it didn’t



take any longer than I have taken in telling you now. \* \* \* Absolutely nothing said about any adjustments of any kind. \* \* \* The first I heard of an adjustment account was here.”

Speaking of the earlier conversation, in March, alluded to by Boss, Peake says that he made no offer to sell to Boss on an inventory basis; that his proposition was to sell his stock in the company, and that he always expected to sell for a lump sum; that he assigned his stock in blank to Boss; that he at no time insisted or requested that the corporation be dissolved, and that he “really didn’t know” that the corporation had been dissolved until the tax question arose in the summer of 1920.

This fairly presents the contentions of the parties respecting the nature of the transaction had between them at the depot. They differ radically, and the question must be determined upon the nature of their dealings subsequently and the manner in which the final adjustment was made.

On May 31, 1917, Peake tendered to the board of directors and stockholders of the Boss & Peake Automobile Company his resignation as secretary and treasurer and director of such company. On the same day, at a stockholders’ meeting, at which were present C. L. Boss, representing 298 shares, R. J. McRell, 1 share, and R. E. Murphy, 1 share, his resignation was accepted, and McRell was elected director in his stead.

On June 1, 1917, Boss and McRell filed with the county clerk and *ex-officio* recorder of Multnomah County a certificate [43] declaring that they had



entered into copartnership under the assumed name of C. L. Boss Automobile Co.

A bill of sale was executed by the Boss & Peake Automobile Company, through its president, C. L. Boss, and R. J. McRell, Secretary, purporting to sell, assign and convey all the property of the corporation to the C. L. Boss Automobile Company. The paper is without date, but it purports to have been acknowledged on July 3, 1917. At a meeting of stockholders held June 22, 1917, this bill of sale was ratified, as were all the acts and doings of Boss and McRell, individually and as officers of the corporation. At this meeting the corporation was declared to be dissolved.

The transactions which closed the agreement of May 21st took place on June 1, 1917, at the First National Bank, in Portland. The C. L. Boss Automobile Company gave to Peake eight notes, each for the sum of \$1,200, and each secured by a Hudson automobile, as per contracts which were subjoined to the notes. Thereupon Peake gave his check to the C. L. Boss Automobile Company for \$9,600, which was delivered to Boss. Boss thereupon deposited the same in the bank to his account, together with \$8,000 which he had borrowed from The Western Bond & Mortgage Co., and the further sum of \$8,537.15, which he obtained from the Boss & Peake Automobile Company on his note, making in all \$26,137.15. Boss then gave Peake his check on the bank for that amount, and Peake assigned his stock, 149 shares, to Boss, and W. H. Bietau assigned 1 share to R. J. McRell, all in blank, and

these were delivered to Boss. Thus all matters between Boss and Peake were settled and closed. Thenceforth Peake held the notes of the C. L. Boss Automobile Company in the sum of \$9,600, secured as has been indicated. These notes were subsequently paid, as the cars were disposed of, presumably by the C. L. Boss Automobile Co. [44]

The books and records of the Boss & Peake Automobile Company show that on June 1st the company gave to C. L. Boss its check for \$8,537.15. This was one of the checks deposited in the bank to the account of Boss, to enable him to draw the check of \$26,137.15 to the order of Peake. The book entries in the combined cash and journal show the following:

“E. W. A. Peake, Cap. a/c.....\$15,000.00

Do	Sal’y a/c.....	1079.17
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Do for Mah’y Desk & Chairs.....	57.98
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Do as earnings 11/25 to 5/31.... 10,000.00

C. L. Boss, by check, Cap. a/c..	26,137.15.”
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In the journal is found this entry:

“Profit & L..... 10,000.00

Do .....	11,373.32
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Interest per agreement:

E. W. A. Peake.....	10,000.00
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C. L. Boss 1/2 profits.....	11,373.32.”
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The evidence shows that a balance of \$1,373.32 was passed to surplus account. It is further shown that the profits of the company on June 1st were \$22,746.64. This does not seem to be controverted.

These records, it is shown by Murphy, the bookkeeper, were not written up and posted until about the 19th day of June, but they were designed to record the transactions of the date of June 1st; the bookkeeper being unable, for lack of time, to insert the entries at the time the transactions took place.

Other entries that throw some light upon the subject of controversy are: One in the ledger showing that the surplus account of \$1,373.32 was passed, to C. L. Boss \$996.21, and to R. J. McRell \$377.11. And two in the combined cash and journal, of date June 19, 1917, the first a charge "Clearing a/c \$4223.91," evidenced by check No. 2804; and the second, "Clearing a/c Tr. from B. & P. A. Co. to C. L. B. & Co. \$4223.91." [45]

The books of the Boss & Peake Automobile Company were not closed on June 1st, but were used by the C. L. Boss Automobile Co., and carried on as though there had been no suspension of business on the part of the corporation.

As to the item of \$22,746.64, representing the profits of the corporation, Mr. Boss says it was "divided and held in abeyance to find out how much interest McRell would take in the business." And as to the surplus of \$1373.32, he says it was "credited to ourselves (meaning himself and McRell), because ourselves would absorb in the going busi-

ness according to our percentages." He had reference to the percentages of capital each was to have in the copartnership.

Boss further testifies that Peake had nothing to do with the business of the new company after he sold out, "after he took his distribution."

Peake testifies that he never requested that the corporation be dissolved, and had nothing to do with the organization of the C. L. Boss Automobile Company, and never had any interest in it.

The evidence is too long and the books too prolix to attempt a particular analysis thereof. But, from what has been noted, we have a fairly accurate basis from which to formulate our conclusion touching the nature of the agreement or understanding of the parties, had at the depot and subsequently brought to a close by the culmination at the bank.

Boss and McRel agree in all material particulars as to the understanding reached at the depot. Peake discloses an entirely different arrangement. Standing alone, and according to the witnesses' full credibility, Boss would have the preponderance of the evidence in his favor. But the conversation at the depot is not all there [46] is in the record to explain the transaction. The agreement culminated at the bank. We have in what took place there physical facts, which in their evidentiary character are potent, and scarcely to be disputed. In short, Boss assembled his funds and placed them in the bank to his credit, so that he could draw against them. Thereupon he drew his check to the order of Peake, and delivered it to him. At the



same time, Peake's stock was assigned in accordance with their understanding, and thus the transaction was closed. Concretely, this was a culmination of the entire agreement. Nothing whatsoever was reserved respecting a dissolution of the corporation. Boss had acquired the stock, and, he being the owner of the other half of the stock, the corporation was in his hands, to do as he liked with it,—to dissolve it, and wind out the business in which it had been engaged, or to continue it as a going concern.

In this connection, it should be recalled that the records show that Peake tendered his resignation as secretary, treasurer and director of the Boss & Peake Automobile Company on May 31st, to take effect as of that date. This was accepted on the same day, at a stockholders' meeting, in which Boss represented 298 shares of stock, and McRell was elected a director in Peake's stead.

Peake may have known, and must have known, that Boss and McRell intended forming a copartnership and taking over the assets of the corporation; but in this he was not concerned. He loaned the copartnership \$9,600, and accepted its paper, taking certain automobiles as security. This was to enable Boss to assemble the fund with which to pay him. Boss drew against the amount, when he drew his check to the order of Peake, in payment of the purchase price of the stock. [47]

It is doubtful whether, at the exact time of the transaction at the bank, the certificate had been executed designating the name and style of the



copartnership, for Boss and McRell both testify that they repaired immediately to the office of Mr. Logan for the purpose of having that done. That is of minor importance, however, as it is not disputed that they had previously agreed between themselves to enter into such relations.

Much has been said in the testimony respecting numerous satisfactory estimated statements, which Boss claims were made from time to time, which enabled the parties to ascertain as the business progressed very closely what profits had accumulated. Peake denies that such statements of the business were frequently made, or at all. In this he is supported by Murphy, the bookkeeper. The dispute, however, is of little importance, as Peake does not deny that he kept himself fairly well posted touching the accumulation of profits during the pendency of the business of the company. This enabled him in his estimate to put a satisfactory price on his stock.

What we have of the books consists in a measure of trial balances. There was never any inventory of the assets made, and, of course, Peake never had any knowledge of such, nor any hand or part in it. The process of dissolution was simply for the C. L. Boss Automobile Company to take over the business and assets of the Boss & Peake Automobile Company, in which Peake, having resigned as director and assigned his stock to Boss, had no part. The whole proceeding was thenceforth directed by Boss and McRell. The Boss & Peake Automobile Company, through Boss, its president, and McRell,

its secretary, passed all of its property by bill of sale to the C. L. Boss Automobile Company, a co-partnership; but the business of the corporation was not closed until about the 19th day of June, [48] 1917, nor was the corporation finally dissolved until the 22d.

Referring to the affidavits of Boss and McRell, made at the time the tax was assessed, it will become apparent that Boss then had a somewhat different theory of the supposed division of the assets between himself and Peake; the theory being that there was an equal division of the entire assets of the corporation. McRell concretely states what was then done, from Boss' standpoint, as follows:

“That on said 1st day of June, 1917, a division of the physical assets of said Boss & Peake Automobile Company, a corporation, was had and made by ascertaining from the periodical statement, kept and maintained by said corporation, of the value of all the physical assets, including accounts and estimated profits, and by such division E. W. A. Peake received in cash the full sum of \$26,137.15, which was one-half of the value of said assets, as above set out, together with the value of a certain desk owned privately by E. W. A. Peake and valued at \$53.50; in other words, E. W. A. Peake received one-half of \$52,167.30, which was \$26,083.65, plus \$53.50, making \$26,137.15.”

Boss says, speaking of the alleged agreement of May 21st, that the assets “were to be divided 50 per cent going to myself and 50 per cent going to

Mr. Peake." His testimony now shows that the total assets of the corporation were, on June 1st, \$52,746.64, of which \$22,746.64 was carried in the profit and loss account; that \$10,000 of this amount was paid to Peake, \$11,373.32 credited to himself, and \$1,373.32 passed to surplus account and subsequently divided between himself and McRell, according to their several interests in the copartnership. So that there could not have been a physical division of assets, as asserted by Boss and McRell in their affidavits addressed to the revenue officers. Nor was there an equal division of such assets. There was never an inventory made up of the entire assets, brought down to the date of the culmination of the transaction, and the parties did not deal with reference thereto when they closed their negotiations. This change of position by Boss and McRell is of significance in weighing [49] the testimony *pro* and *con* touching the controversy, and in determining what was the real agreement of the parties.

The income tax was not assessed against the corporation until May 1, 1920. Peake had no knowledge of it until he received information thereof from the office of the Collector of Internal Revenue. The tax is referable in small measure to the act of September 8, 1916 (39 Stat. 756), but by far the greater proportion to the act of October 3, 1917 (40 Stat. 300). The later act, although passed subsequent to the time the business was conducted by the Boss & Peake Automobile Company, is retroactive in its effect. It is claimed by Boss that, at the

time of the transaction between him and Peake, the tax was not in their minds, and that therefore it did not enter as an element in their agreement; that only the current liabilities were assumed by him. Some of the tax, however, was assessable against the property; that is, under the act of September, 8, 1916. The parties were presumed to know of this, and, of course, they were required to take notice of the power of Congress to enact a retroactive measure of the kind denoted by the act of October 3, 1917.

It is a matter of moment, also, that the stock had a value beyond the mere book value of the assets of the corporation. The enterprise had proven to be profitable. On an investment of \$30,000, the company had earned more than \$22,000 in five months, and the goodwill must have been of considerable worth. Peake gave up his interest in this when he parted with his stock.

Considering all the testimony, and the manner in which the parties have treated the subject matter of their adjustment, [50] I am impelled to the conclusion that the agreement consisted in the sale by Peake of his capital stock in the Boss & Peake Automobile Company to Boss for the lump consideration of \$25,000; it being understood that Peake should be paid the salary due him, and compensation for the furniture which was his individual property; and that it was not for a dissolution of the corporation and a division and distribution of its physical assets between them. As between Boss and Peake, therefore, the former is liable for the



entire tax, and the latter should not be held accountable for any of it.

Now, as to Peake's liability to the Government, it is not questioned that the United States may sue, as it has done, for the tax.

The tax provision of the act of October 3, 1917, is retrospective as of January 1, 1917, but the act is not unconstitutional because of that provision.

Brushaber vs. Union Pacific Railroad Company,  
240 U. S. 1.

As is said in Brady vs. Anderson, 240 Fed. 665, 667:

"The tax is against the citizens and residents of the United States personally. They are chargeable in respect to income received by them. The statement that the tax is upon this income does not create an obligation *in rem*. It is only a way of saying that the owner is taxable with reference to the income."

So is a corporation chargeable with the tax, as a person is charged, although the tax is upon its income.

The Government bases its remedy against Peake upon the hypothesis that he was a stockholder in the Boss & Peake Automobile Company when and at the time it was dissolved, and that he came into possession of a portion of its property in the way of distribution sufficient in value to pay the remainder of the tax due, [51] and therefore that he is liable. In other words, it is argued that Boss and Peake received the then existing assets of the corporation, and that it is immaterial to the Gov-



ernment as to what form the distribution took, so long as the assets of the corporation were actually depleted by the stockholders, whether Peake received his portion in form as part of the purchase price of his stock or as a distribution of the assets.

It must be conceded that where, upon the dissolution of a corporation, its assets are distributed among the stockholders, the stockholders become liable to the creditors of the corporation at least to the extent of the property received by them. This is referable to the so-called trust doctrine.

As we have seen, Peake sold his stock to Boss. Having the stock, the Boss & Peake Automobile Company, through Boss, as president, and McRell, to whom was assigned one share of stock as secretary, by bill of sale, sold and transferred the entire assets of the corporation to the C. L. Boss Automobile Company. The sale was in due time ratified by the stockholders, Boss representing 298 shares of the stock at the time. In all this, Peake had no part. Availing themselves of the corporation assets, Boss and McRell were enabled to, and did, organize the C. L. Boss Automobile Company, a copartnership; Boss giving to McRell such interest only as McRell was able to purchase and pay for. The copartnership having been organized and established as an entity capable of holding the assets of the corporation transferred to it, Boss and McRell were so equipped that they thereupon, through the usual formalities, dissolved the corporation at a time when it possessed no assets for distribution. Again, in neither the formation of the

copartnership nor the dissolution of the corporation did Peake have a hand. The logical sequence was that Boss acquired all the assets [52] of the corporation, and utilized them as his capital in the copartnership, and this by reason of the fact that he had acquired Peake's stock. Otherwise, he could not have accomplished his purpose, simply because Peake would not have allowed it.

Applying the trust doctrine, it would follow that Boss, and not Peake, would be liable for the debts of the corporation, and with them the tax in question. Aside from this, it must be borne in mind that Boss assumed the liabilities, and Peake was to be relieved of them.

In *Pierce vs. United States*, 255 U. S. 398, the Waters Pierce Oil Company sold and transferred all its property to the Pierce Oil Corporation, and the proceeds were distributed among three stockholders. Suit was instituted against the Waters Pierce Oil Company and the three stockholders for the amount of a sentence imposed against the Oil Company. The bill was dismissed as against the Oil Company, and the Government was awarded a decree against the stockholders.

In the case of *Martin vs. City of Lexington*, 210 S. W. 483, all the owners of stock in Curry, Brown & Snyder, a corporation, sold and delivered to E. L. Martin their shares of stock, which transaction he attempted to construe as a purchase of the assets. After the sale, Martin took charge of the business, and commingled his merchandise with that taken over. He was held liable for taxes assessed against

the corporation's stock of merchandise, in a suit to recover against him as a stockholder.

These cases are illustrative. Both proceeded under the trust doctrine for recovery; not otherwise. The Martin case is of marked analogy to the one at bar. Martin claimed to have purchased the assets, and not the stock, but the court held otherwise. [53]

It is said that Peake depleted the assets of the corporation, and that for this he is liable. What he did, so far as the record shows, was to loan the C. L. Boss Automobile Company \$9,600, and take as security for the payment thereof mortgages on certain cars, which were previously a part of the assets of the corporation. The money was advanced to the copartnership by check, and by it turned over to Boss, who utilized it in paying Peake in part. The copartnership was left, as we have seen, owing Peake the amount of the \$9,600. The result was that a part of the previous assets of the corporation, but now the property of the copartnership, was thus encumbered in favor of Peake. Another circumstance is that Boss borrowed \$8,537.15 from the corporation on his note, and with this paid Peake, in part, the consideration for which he sold his stock.

Whether this amounted to a depletion of the assets of the corporation may be questioned, even though the property had not passed to the copartnership. In the one case, the entity had the money, which was a lien upon the cars hypothecated; and in the other it had the note of Boss, the equivalent,

supposedly, of the money withdrawn from its coffers. But, however that may be, a mere depletion of assets, unless accompanied by fraud with the view of overreaching creditors, does not afford basis for an equitable action to recover against the party receiving the assets withdrawn. Dividends are paid out every day, which action in itself is a depletion of assets accumulated; yet no one thinks, when the corporation had gone into liquidation or insolvency, of suing to recover such dividends. So in the present case, unless the supposed depletion is referable to the so-called trust doctrine, which it manifestly is not, the Government cannot have remedy on that account. I was impressed at the trial that, Peake having received money which came from the corporation, sufficient to cover the tax due, he would [54] be rendered liable thereby; but, from the foregoing considerations, obviously this cannot be the rule.

The Government will have a decree against C. L. Boss for the amount of the tax due, with interest and penalty. The bill of complaint will be dismissed as to E. W. A. Peake, and the cross-bill of Boss & Peake Automobile Company and C. L. Boss against Peake will also be dismissed, with costs to Peake against Boss.

Filed Dec. 11, 1922. G. H. Marsh, Clerk. [55]



AND AFTERWARDS, to wit, on Friday, the 19th day of January, 1923, the same being the 64th judicial day of the regular November term of said Court—Present the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [56]

In the District Court of the United States for the  
District of Oregon.

No. L—8786.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY,  
a Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Decree.**

THIS CAUSE came on to be heard and having been argued by counsel and considered by the Court:

IT IS ORDERED, ADJUDGED and DECREED as follows, to wit:

That plaintiff have judgment against the defendant, Boss & Peake Automobile Company, a corporation, and C. L. Boss and each of them for the sum of \$6,202.65, with interest thereon at the rate of 1% per month from August 15, 1920, amounting to \$1,736.74, together with 5% penalty



on the said sum of \$6,202.65 amounting to \$310.13, and for the costs and disbursements of this suit.

IT IS FURTHER ORDERED AND DECREED that plaintiff take nothing from the defendant E. W. A. Peake, and that plaintiff's amended bill be dismissed as to the defendant E. W. A. Peake.

IT IS FURTHER ORDERED and DECREED that the defendant C. L. Boss take nothing from the defendant E. W. A. Peake, that the cross-bill of defendants Boss & Peake Automobile Company, a corporation and C. L. Boss against defendant E. W. A. Peake be dismissed; and that E. W. A. Peake recover from the defendant C. L. Boss his costs and disbursements herein.

Dated at Portland, Oregon, this 19th day of January, 1923.

(Signed) CHAS. E. WOLVERTON,  
District Judge.

Filed Jan. 19, 1923. G. H. Marsh, Clerk. [57]

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AND AFTERWARDS, to wit, on the 3d day of February, 1923, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [58]

In the District Court of the United States for the  
District of Oregon.

Case No. —.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Petition for Appeal and Order Allowing Same.**

To the Honorable CHARLES E. WOLVERTON,  
District Judge of the United States for the  
District of Oregon.

The above-named defendant, C. L. Boss, considering himself aggrieved by the decree entered in the above court on the 19th day of January, 1923, in the above cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and prays that an appeal be allowed and a citation issue as provided by law, and that a transcript of the record and proceedings upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that a proper order touching the security to be required in

order to perfect this appeal be made, and that upon the filing of a bond in such sum as shall be provided for in the order attached hereto, that an order of supersedeas be made herein and the filing of the bond acknowledged as a supersedeas.

Dated this 2d day of February, A. D. 1923.

JOHN F. LOGAN and  
ISHAM N. SMITH,

Attorneys for C. L. Boss. [59]

The foregoing petition is hereby granted and appeal is allowed in the above-entitled cause, and it is

ORDERED that the appellant, C. L. Boss, shall furnish an undertaking on the appeal in the sum of five hundred dollars (\$500.00) and shall furnish an additional obligation, either in the same or separate instrument or bond as the appeal, in the sum of nine thousand dollars (\$9,000.00), conditioned as a supersedeas bond, and that upon the filing of the bond for the appeal that such appeal be effected and upon the filing of the bond for supersedeas that execution on the decree be stayed until the further order of the court.

Dated this 2d day of February, A. D. 1923.

CHAS. E. WOLVERTON,  
Judge Who Tried said Cause.

Service of the foregoing petition for appeal and allowance admitted and a copy thereof received

this 3d day of February, 1923.

THOS. H. MAGUIRE,

Asst. U. S. Attorney,

Attorney for Plaintiff, United States of America.

JOHN F. LOGAN and

ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Company,  
a Corporation.

JOHN F. REILLY and

WINTER and MAGUIRE,

Attorneys for E. W. A. Peake.

Filed February 3, 1923. G. H. Marsh, Clerk.

[60]

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AND AFTERWARDS, to wit, on the 3d day of  
February, 1923, there was duly filed in said  
court an assignment of errors, in words and  
figures as follows, to wit: [61]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Assignment of Errors.**

Comes now Charles L. Boss and files the follow-  
ing assignment of errors upon which he will rely

upon the prosecution of his appeal from the decree made by this Honorable Court on the — day of January, 1923, in the above-entitled cause:

I.

The Court erred in holding and deciding that Charles L. Boss was responsible to and should be decreed and was decreed to pay to the plaintiff the remaining unpaid portion of the tax involved in this controversy with interest and penalties, and in decreeing that the said Charles L. Boss be required to pay to the plaintiff any sum whatsoever of the amount involved herein.

II.

The Court erred in not holding and deciding that the defendant E. W. A. Peake was and is responsible to the plaintiff, and as between him and Charles L. Boss the said E. W. A. Peake was and is responsible and should be decreed to pay the remaining unpaid portion of the tax, with interest and penalties, involved in this case.

III.

The Court erred in not holding and deciding that Charles L. Boss should be absolved and freed from any and all claims of the Government involved in this controversy.

IV.

The Court erred in rendering decree against the said Charles L. Boss for any sum whatsoever and in not rendering decree against the said [62] E. W. A. Peake as prayed for in Boss' pleadings, upon the ground that the evidence introduced upon the trial entitled the plaintiff to recover from the said E. W. A. Peake and as between E. W. A.



Peake and Charles L. Boss entitled such recovery by plaintiff against E. W. A. Peake alone.

V.

The lower court committed error upon the whole record in holding that Charles L. Boss was not entitled to the relief sought for in his pleadings.

VI.

The lower court committed error upon the whole record in dismissing the bill as to the said E. W. A. Peake, and in holding and deciding that the transaction between Boss and Peake was a sale of Peake's stock to Boss and was not a dissolution and distribution agreement.

WHEREFORE, the said Charles L. Boss, defendant, prays that the decree and judgment of the District Court of the United States for the District of Oregon be reversed.

JOHN F. LOGAN and  
ISHAM N. SMITH,

Attorneys for Charles L. Boss.

Service of the foregoing assignment of errors admitted and a copy thereof received this 3d day of February, 1923.

THOS. H. MAGUIRE,  
Asst. U. S. Attorney,  
Attorney for Plaintiff.

JOHN F. LOGAN and  
ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Company.

JOHN F. REILLY,  
WINTER & MAGUIRE,  
Attorneys for E. W. A. Peake.

Filed February 3, 1923. G. H. Marsh, Clerk.  
[63]

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AND AFTERWARDS, to wit, on the 3d day of February, 1923, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit: [64]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff and Appellee,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation,

Defendant and Appellee,

C. L. BOSS,

Defendant and Appellant,  
and

E. W. A. PEAKE,

Defendant and Appellee.

**Bond on Appeal.**

WHEREAS, in the above court and cause on January 19, 1923, decree in favor of the United States, plaintiff, was duly given, made, rendered and entered against defendants Boss & Peake Automobile Company, a corporation, and C. L. Boss for the sum of eight thousand two hundred forty-nine dollars and fifty-two cents (\$8,249.52), together with interest and costs, and also in favor

of the above named E. W. A. Peake, defendant, dismissing the cross-complaint of C. L. Boss and awarding costs to said E. W. A. Peake, and said C. L. Boss is desirous of appealing and has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from such decree, and of giving an undertaking for costs, disbursements and damages on such appeal, therefore, in consideration of the premises and of such appeal, we, the undersigned, C. L. Boss as principal, and American Surety Company of New York, a corporation organized, created and existing under and by virtue of the laws of [65] the State of New York and authorized to do business in the State of Oregon, and to furnish appeal and stay bonds of the character herein given, as surety, do hereby acknowledge ourselves and our and each of our heirs, executors, administrators, successors in interest and assigns, jointly and severally, firmly bound unto the above-named plaintiff and appellee United States, and unto the above-named defendant and appellee E. W. A. Peake, and unto the above-named defendant and judgment debtor and appellee Boss & Peake Automobile Company, who refuses to join in this appeal, in the sum of five hundred dollars (\$500.00) lawful money of the United States.

Yet, upon this express condition, that if the above C. L. Boss, appellant, shall prosecute his said appeal to effect and answer all costs and damages, if he fail to make good his plea, then this

obligation to be void, otherwise to remain in full force and effect.

And, whereas, further, said C. L. Boss, appellant, is desirous of giving an undertaking for stay of proceedings in said decree appealed from pending said appeal.

NOW, THEREFORE, in consideration of the premises and of the stay of proceedings on said decree pending said appeal we, the undersigned, C. L. Boss as principal, and American Surety Company of New York, a corporation organized, created and existing under and by virtue of the laws of the State of New York and authorized to do business in the State of Oregon, and to furnish appeal and stay bonds of the character herein given, as surety, do further hereby acknowledge ourselves and our and each of our heirs, [66] executors, administrators, successors in interest and assigns, jointly and severally, firmly bound unto the above-named appellee United States, and unto said appellee E. W. A. Peake, and unto said appellee Boss & Peake Automobile Company, in the sum of nine thousand dollars (\$9,000.00), lawful money of the United States.

Yet, upon this express condition, that if the above-named appellant C. L. Boss shall prosecute his said appeal and shall pay unto said appellee the United States of America the full sum of said decree so appealed from, if said decree shall be wholly affirmed, or shall pay that part of the sum awarded by said decree as to which said decree shall be affirmed, if affirmed only in part, then this obligation be void, else to remain in full force.



WITNESS the hand and seal of the principal and appellant, C. L. Boss, and the name and corporate seal and signature of the duly appointed representatives of said American Surety Company of New York, at Portland, Oregon, this 2d day of February, 1923.

C. L. BOSS,  
Principal.

AMERICAN SURETY COMPANY OF  
NEW YORK.

By W. J. LYONS,  
Resident Vice-President,

Approved by  
W. J. LYONS,  
Resident Agent.

(Corporate Seal) Attest: W. A. KING,  
Resident Assistant, Secretary,  
Surety. [67]

Examined and approved.  
CHAS. E. WOLVERTON,  
Judge.

United States of America,  
District of Oregon,—ss.

Due, legal and timely service accepted of foregoing bond at Portland, Oregon, February 3, 1923.

THOS. H. MAGUIRE,  
Attorney for Pltff. U. S. A.

JOHN F. REILLY and  
WINTER & MAGUIRE,

Attorneys for E. W. A. Peake.

JOHN F. LOGAN and  
ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Co.



Filed February 3, 1923. G. H. Marsh, Clerk.  
[68]

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AND AFTERWARDS, to wit, on the 19th day of February, 1923, there was duly filed in said court a stipulation relative to statement of the evidence, in words and figures as follows, to wit: [69]

In the District Court of the United States for the  
District of Oregon.

Case No. —.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Stipulation Relative to Statement of Evidence.**

By reason of the numerous objections proposed by defendant E. W. A. Peake and plaintiff United States to the statement of the Evidence in narrative form presented by C. L. Boss and the Boss & Peake Automobile Company, and of the difficulty of correcting such narrative statement to clearly and precisely state the evidence, and the contentions of the parties, and also by reason of the extended examination of technical witnesses and

of the matters involved in this record, it has been found to be not practicable to reduce the testimony to a narrative form which will clearly and precisely state the different contentions of the respective parties, and therefore the parties, by counsel, have agreed, subject to the approval of the Court, as follows:

(1) That the entire stenographic transcript of the evidence and the proceedings at the trial which is now on file in this court may be settled, allowed and printed as the statement of the case on appeal;

(2) The respective parties reserve all rights not hereby expressly waived except that the appellees, [70] to wit, the United States and said E. W. A. Peake hereby expressly waive any rights they may have to attack the validity of the record on appeal or the appeal by reason of the printing of the entire stenographic transcript as above set forth in lieu of its narrative form.

Dated Portland, Oregon, this 19th day of February, 1923.

THOS. H. MAGUIRE,

Asst. Attorney for the United States.

WINTER & MAGUIRE,

JOHN F. REILLY,

Attorneys for E. W. A. Peake.

JOHN F. LOGAN,

ISHAM N. SMITH,

Attorneys for C. L. Boss and Boss & Peake Automobile Company.

Filed February 19, 1923. G. H. Marsh, Clerk.  
[71]

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AND AFTERWARDS, to wit, on the 19th day of February, 1923, there was duly filed in said court a statement of the evidence, in words and figures as follows, to wit: [72]

In the District Court of the United States for the  
District of Oregon.

No. —.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Stipulation Re Settling, Allowing and Approving  
Statement of Evidence.**

It is hereby stipulated and agreed that the annexed statement of the evidence and exhibits consisting of one volume of evidence from pages 1 to 270, inclusive, and of the various exhibits of the respective parties now in possession of the clerk of the court may be by the Court settled, allowed and approved as correct.

It is further stipulated that such exhibits which are not included in the transcript of the exhibits

may be certified to the Circuit Court of Appeals in their original form.

Dated Portland, Oregon, this 19th day of February, 1923.

THOS. MAGUIRE,

Asst. Attorney for the United States.

WINTER & MAGUIRE,

JOHN F. REILLY,

Attorneys for E. W. A. Peake.

JOHN F. LOGAN,

ISHAM N. SMITH,

Attorneys for C. L. Boss and Boss & Peake Automobile Company. [73]

In the District Court of the United States for the District of Oregon.

No. L—8786.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a Corporation, C. L. BOSS and E. W. A. PEAKE,

Defendants.

**Order Settling Statement of Evidence.**

The foregoing statement of evidence and proceedings in the above cause named in the caption consisting of one volume, pages 1 to 270 inclusive, of the testimony and the exhibits introduced in evidence shown by said transcript and in possession of the clerk of the above court, is in due time

presented to the judge of this court and is approved by him as true, complete and properly prepared, said parties having stipulated that the record be prepared in question and answer form and that the Court approve the same; and it appearing to the Court that the nature of the case is such that it is proper that, and the ends of justice will be best subserved by presenting the record prepared in question and answer form.

And it is further ordered that all exhibits referred to in said statement shall be deemed a part hereof the same as if fully set out therein.

Dated Portland, Oregon, this 19th day of February, 1923.

CHARLES E. WOLVERTON,  
Judge. [74]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation.

LESTER W. HUMPHREYS, U. S. Attorney, for  
the Government.

JOHN F. LOGAN and I. N. SMITH, for Defendant Boss.

JOHN F. REILLY and ROBERT F. MAGUIRE,  
for Defendant Peake.

Before CHARLES E. WOLVERTON, District  
Judge.



Portland, Oregon, May 22, 1922, 2 P. M.  
(May 23, 24, July 7).

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**Testimony of M. E. Walker, for the Government.**

M. E. WALKER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. HUMPHREYS.)

Mr. Walker, what is your business?

A. Deputy Collector of Internal Revenue.

Q. For what district? A. District of Oregon.

Q. Do you know anything about the efforts made by the collector to collect a tax on the income of the Boss & Peake Automobile Company?

A. I do.

Q. What demands, if any, were made for their tax, and upon whom were those demands made, and when?

Mr. REILLY.—Confining yourself to your personal knowledge, and not what some one told you.

A. A notice and demand on form 1-17, which is

(Testimony of M. E. Walker.)

the first notice and demand, was made and mailed from the office on August 7, 1920.

Q. To whom?

A. To Boss & Peake Automobile Company, 615 Washington St., first.

Q. What further demand was made, if any?

A. A further demand was made on Mr. E. W. A. Peake, on the same form.

Mr. REILLY.—That is objected to. The document will speak for itself. The witness is presuming to testify to the contents of an alleged document. The document will speak for itself.

COURT.—When was that mailed? [76—1]

A. To E. W. A. Peake, on the same date, and I have a registry return receipt here on the 18th.

COURT.—What is your objection, Mr. Reilly?

Mr. REILLY.—He is presuming to testify that a demand was mailed to Mr. Peake, made upon Mr. Peake. Now, that demand apparently was in writing, and we have here a document which no doubt he refers to, and it is not a demand upon Mr. Peake; and I object to the witness being permitted to testify to the contents of that document, that is, to make the statement that it was a demand upon Mr. Peake. Something was mailed, but what it was, the document will show for itself.

COURT.—We are only getting at the date now.

Mr. HUMPHREYS.—The date and to whom it was addressed.

Mr. MAGUIRE.—That is the very point. The document shows to whom it was addressed.

(Testimony of M. E. Walker.)

A. No.

COURT.—I presume that would be true.

Mr. MAGUIRE.—We have the document here if he wants to identify it.

Mr. HUMPHREYS.—We don't claim anything for what Mr. Walker says about the contents. We can get along better, perhaps, if they will produce the document. It may be stipulated that this particular document was mailed by the collector to Mr. Peake on a certain day.

Mr. REILLY.—No, we won't admit that.

Mr. HUMPHREYS.—How did Mr. Peake get it?

Mr. REILLY.—Mailed to Boss & Peake Automobile Company, care of Mr. Peake.

Mr. HUMPHREYS.—We will have it that way, then, whatever the fact is. It came into Mr. Peake's hands, didn't it? It [77-2] was addressed to Mr. Peake. I offer this registry return receipt in evidence. (Marked "Government's Exhibit 1.")

COURT.—You say it was addressed to Mr. Peake?

Mr. REILLY.—Yes, the envelope was addressed to Mr. Peake; not the document itself.

Mr. HUMPHREYS.—Will you let me have the envelope, Mr. Reilly?

Mr. REILLY.—Yes. (Produces envelope.)

Mr. HUMPHREYS.—May we stipulate that this paper, which is Form 1-17, notice and demand for tax, was mailed in the envelope addressed E. W. A. Peake, Esq., by the Collector of Internal Revenue

(Testimony of M. E. Walker.)

for the district of Oregon? Is that agreeable, Mr. Reilly?

Mr. REILLY.—Yes.

Mr. HUMPHREYS.—I offer these in evidence.

(Notice and demand marked “Government’s Ex. 2-A.” Envelope marked “Government’s Ex. 2-B.”)

Mr. HUMPHREYS.—What other enclosures were with this, if any?

Mr. REILLY.—I think none.

Mr. HUMPHREYS.—You may cross-examine. It is admitted by Mr. Boss that demand was made on him?

Mr. LOGAN.—Yes. The corporation has been out of existence for two years. A similar document to that was addressed to Mr. Boss.

#### Cross-examination.

(Questions by Mr. REILLY.)

Mr. Walker, at the time this document was mailed in this envelope addressed to Mr. E. W. A. Peake, you were acting on the strength of some affidavits that had [78—3] been filed by Mr. Boss with the Department, were you, and consultations that you had had with Mr. Boss and with Mr. Logan, his attorney? A. No.

Q. Had you made any investigation independent of that induced by affidavits of Mr. Boss and Mr. McRell, his partner, and Mr. Logan? A. No.

Q. Had you made any other investigation than that which you made in response to their affidavits? A. No.



(Testimony of M. E. Walker.)

Q. In that investigation, did you apply to Mr. Peake for his side of the controversy? A. No.

Q. When this notice was given, didn't Mr. Peake and myself wait upon you and ask you, if you intended that as a demand upon Mr. Peake, to make the demand upon Mr. Peake in writing so as to give us a chance to take the stand that we would take then?

A. I cannot distinctly recollect.

Q. Well, you recollect me, don't you?

A. I do.

Q. You recollect Mr. Peake and myself calling upon you?

A. Yes. That was after the notice was sent out.

Q. After the notice was sent out. Immediately after the notice was sent out, wasn't it?

A. Yes.

Q. All right. Didn't Mr. Peake and myself, at the Custom House, I think just the three of us being present— A. Yes.

Q. Within a day or two after this notice was sent out, *request* [79—4] *you*, if you wanted that to be considered as a demand upon Mr. Peake, to make it in the form of a demand on Mr. Peake?

A. I cannot distinctly recollect.

Q. You would not say that that conversation did not take place? A. No.

Q. Let me ask you whether you remember refusing to do so? A. I cannot recollect that.

Q. And did you not say in that same conversation that your mind was made up, and that you had



(Testimony of M. E. Walker.)

an idea as to who was right and who was wrong in this controversy?     A. No.

Q. Did you make any statement similar to that?

A. I couldn't have made it.

Q. Now, at that same time, in that same visit, didn't Mr. Peake and myself ask you to let us see the return that had been made by the corporation?

A. I don't recollect that.

Q. Did you not refuse to let us see it?

A. I don't recollect that.

Q. Unless we would admit that we owed half of the tax?     A. No, sir, I don't recollect it.

Q. No conversation of that kind at all?

A. I have a faint recollection of a conversation similar to that; but this is the way I had it: that you didn't admit liability—you asked to see papers in which you admitted no liability, which is contrary to the provisions of the statute.

Q. Well, then, do I understand from that, that you did refuse to let us see the return made by the Boss & Peake Automobile Company?

A. With that qualification, yes. [80—5]

Q. Well, you did refuse?     A. Yes.

Q. And you did this, notwithstanding the fact that you were making a claim against us?

A. I did it because of the fact that you denied liability, is my recollection.

Q. You expected us to admit liability, and then you would let us see anything we wanted to see?

A. Yes. You would then admit yourself as a part of the corporation.

(Testimony of M. E. Walker.)

(Examination by Mr. LOGAN.)

Q. At that time, Mr. Walker, there had been returns made by C. L. Boss Automobile Company in 1920?

A. I wouldn't like to state that without seeing the record.

Q. Did you know whether Mr. Weldy at that time had made an investigation of this Boss & Peake Automobile Company?

A. I couldn't state definitely whether it was Mr. Weldy. I knew there was a revenue agent made an investigation.

Q. Or Mr. C. C. Cramer.

A. Over the signature of C. C. Cramer, the revenue agent in charge.

Q. Mr. Summerfield? A. No, sir.

Q. Now, as I understand it, you were telling Mr. Reilly and Mr. Peake that unless they admitted the liability—

A. No, they denied liability.

Q. Unless they admitted some liability, you would not show the records to them?

A. Yes, unless he admitted that he was interested in the corporation at the time.

Q. You did that under rule of the law—under the rule of the department?

Mr. REILLY.—That is not cross-examination, your Honor. [81—6] Mr. Logan has had opportunity to examine this witness. Mr. Logan cannot step into the Government's shoes and lead this witness, that he has already convinced be-

(Testimony of M. E. Walker.)

fore we had an opportunity to be heard in the matter. He certainly should not be allowed in here to put words in this witness' mouth to defend the stand he made when he even refused to make demand on us. If it is redirect, well and good; it may be done in the form of redirect.

Mr. LOGAN.—I have not spoken to this witness since we were down there about two years ago, have I, Mr. Walker?

A. No, not that I recollect.

Q. You have not seen me, have you, since this case was filed? A. No, I have not.

Q. I will ask you whether or not you could, under the rules of the department, have shown it to any party other than one who admitted his interests? A. No.

Q. Did you have more than one conversation with Mr. Peake or his legal representatives?

A. My recollection is only one.

Q. Did you write them other letters after that?

A. Not that I have any recollection of, outside of this.

COURT.—The records ought to show that.

Mr. LOGAN.—I wouldn't know it, your Honor, of course; I am inquiring as to that.

(Questions by Mr. REILLY.)

Q. What is the number of this rule of the department which says that you cannot let a person against whom you are making a claim see the papers? What rule is that?

A. There is no such rule. It says you cannot

(Testimony of M. E. Walker.)

disclose the [82—7] information contained in an income tax return or any investigation concerning it, or anything concerning the income tax of another individual, or corporation, or partnership.

Q. Have you any rule which says you cannot divulge the information on which you base your claim to the person against whom you are making your claim? A. No.

Q. And that was what you refused to do in this instance, wasn't it?

A. No, because liability was denied.

Q. Weren't you making a claim against Mr. Peake?

A. I was making—mailed a claim against him as one of the Boss & Peake Automobile Company.

Q. You were making no claim against Mr. Peake personally? A. No more than to find Mr. Peake.

Mr. HUMPHREYS.—That is hardly fair cross-examination. The attitude of the Government is not to be determined or measured by what was in the mind of this particular witness. The attitude of the Treasury Department regarding Mr. Peake's liability is not to be determined by what is in the mind of this individual.

Mr. REILLY.—I sincerely hope not, Mr. Humphreys. The question is asked to show whether there was a demand, to show the attitude of the witness on the question of demand, so we may know how to measure the value of his testimony.

Mr. HUMPHREYS.—All right.



COURT.—I understand that this controversy is practically between Boss and Peake?

Mr. HUMPHREYS.—It is, your Honor. What I am trying [83—8] to prove is that we made demand on these individuals. That is all I offer this witness for. The cross-examination has gone beyond the question of demand.

COURT.—That must be admitted. Any other questions of this witness?

Mr. REILLY.—No, your Honor.

Excused. [84—9]

Mr. HUMPHREYS.—If your Honor pleases, I now offer in evidence certified copies which have come to me from the Secretary of the Treasury, under the seal of the Secretary, which are the income tax returns of the Boss & Peake Automobile Company with the accompanying documents which were filed at that time. I offer them at this time because they are certified by the Secretary of the Treasury as being photostatic copies of those documents which relate to the particular corporation.

(Marked "Government's Exhibit 3.")

COURT.—Mr. Humphreys, I understand the law under which this tax was levied was a law that was enacted in October, 1917, with retroactive effect?

Mr. HUMPHREYS.—Yes, your Honor.

COURT.—This return was made when?

Mr. HUMPHREYS.—March, 1920.

COURT.—Well, now, do they make that return the basis of the assessment of the tax?

Mr. HUMPHREYS.—Yes, your Honor; and the



documents which I am offering are certified by the Secretary of the Treasury as being copies of the originals in his possession, and which were submitted all together as a part of the return on which this tax was based.

COURT.—There is no controversy as to the validity of this later act?

Mr. HUMPHREYS.—The law itself, I understand there is not.

Mr. MAGUIRE.—No. I understand the Supreme Court has already held that Congress had the right to make that act retroactive, so we are not raising that question. [85—10]

COURT.—That would bind this Court.

Mr. LOGAN.—Neither side has raised the question of the constitutionality of the law, your Honor; and I want to say that neither one of the gentlemen at the time—I think I am correct—ever had in any of their actions any intention of evading this law, because it was finished, and whether it was a sale of stock or a division of the assets, it was made without reference to the payment of a tax.

Mr. HUMPHREYS.—We make no claim that anybody was trying to evade the law at that time.

COURT.—I suppose the Boss & Peake Automobile Company is liable for it anyhow.

Mr. LOGAN.—The corporation is liable to the Government for \$6,000; originally \$12,000, of which \$6,000 has been paid.

Mr. REILLY.—I may say, your Honor, we don't know anything about this tax. We have no means of checking it. We have denied the tax, and we want the Government to prove it. We will not contest it very vigorously, but we want to know how it was arrived at.

COURT.—The Government is trying to prove its case now.

Mr. MAGUIRE.—We object to this, upon the ground that this certified copy of the return is a return not made by the corporation, but made by Mr. Boss as part stockholder, made on March 1, 1920, nearly three years after we ceased to have any interest in the corporation; that therefore the defendant Peake could not be bound by any acts or declarations of either the corporation or any stockholder of the corporation.

COURT.—When was that return made?

Mr. MAGUIRE.—March 1, 1920. Peake sold out to Boss in May, 1917, almost three years prior. This is headed [86—11] "Name of Corporation. Boss & Peake Automobile Co.," giving its address and business. Then it is signed "C. L. Boss, Part stockholder." The word "President" is scratched out. The word "Treasurer" is scratched out. It is not made by any officer of the corporation, or anyone purporting to be an officer of the corporation.

Mr. HUMPHREYS.—But by one who was an officer of the corporation when the corporation had officers.

Mr. MAGUIRE.—Attached in this certified copy are a number of documents. First, is a photographic copy of a second notice and demand of tax made on the corporation, which does not tend to prove any part of the Government's case in this matter.

COURT.—Is that the notice and demand introduced here?

Mr. MAGUIRE.—No, it is an additional notice and demand. It is headed "Second notice and demand." There has been no proof as to that, your Honor. Then appear photostatic copies of affidavits made by R. J. McRell and by C. L. Boss.

COURT.—Who was R. J. McRell?

Mr. MAGUIRE.—R. J. McRell was one of Mr. Boss' partners after Mr. Peake sold out to Mr. Boss.

Mr. SMITH.—When the corporation ceased doing business, he was and is now Mr. Boss' partner, and he is the one who bought in with Mr. Boss in the partnership running from that date.

Mr. HUMPHREYS.—The reason all these various papers are here is, as I understand it, that this return, being made in March, 1920, three years or two years after it ought to have been made, was made in connection with the explanation of why these men ought to be relieved of the consequences of their delinquency in making returns. These affidavits, letters and [87—12] things Mr. Maguire is objecting to were sent with the return, stating why they should be relieved from the con-

sequences of the delinquency. As I understand it, the whole thing taken together constitutes the return, as received in the Treasury Department, of the income tax liability of the Boss & Peake Automobile Company. There are other things in there, but if there is anything there that ought not to be there, certainly the Court can disregard it. That they are competent, I do not have any question.

COURT.—Are you through with your objection?

Mr. MAGUIRE.—No, your Honor. Either counsel for the Government and counsel for Mr. Boss have not read those affidavits, or it has entirely escaped their minds. There is not a single word in one of those affidavits that tends to explain or minimize the proposition of their not making a return in time. These affidavits of Mr. McRell and Mr. Boss are in there solely as arguments to the Government showing that Mr. Peake should be held to one-half of that tax. Now, then, the only matter in here that is signed by Mr. Peake or addressed to Mr. Peake is a photostatic copy of a letter written by him in August, 1920, after the Government had mailed this demand to him.

Mr. HUMPHREYS.—I want that to go in as evidence that he got that demand.

Mr. MAGUIRE.—If that is what you want, we will have no objection to that particular letter going in. But the affidavits of the two parties, which are self-serving declarations made three years after the time of the transaction itself, when they



were endeavoring, although they held the capital stock, to relieve themselves of half of the tax that the [88—13] Government had against them, are not competent evidence. They are made *ex parte*, there is no right of cross-examination; it does not tend to prove a single fact. And that same thing, your Honor, is true with regard to the return made. How can the defendant Peake be bound by a declaration of Boss, not made as an officer of the company, and, even if made as an officer of the company, subsequent to the time he sold out.

COURT.—You don't attempt to deny the fact that a return was made by Boss & Peake Automobile Company?

Mr. MAGUIRE.—Yes, I do.

COURT.—That is, the corporation?

Mr. MAGUIRE.—Yes, I do. There has been no legal return made by Boss & Peake Automobile Company; no legal return made.

COURT.—Do you claim there was a return made by Boss alone?

Mr. MAGUIRE.—Yes, sir. This corporation was dissolved in June, 1917. For the purpose of suit, being sued, making returns, winding up its business, it and its then officers remained in office, except they should be removed by resignation or disposition of stock, for a period of five years. That corporation had, in fact, continued existence and continued officers, and no man by setting himself up here and saying "I am a part stockholder" can



make a return for a corporation. It is not recognized by the law or by regulations.

Mr. HUMPHREYS.—Counsel would have a situation where it would be impossible for the Government to collect from a corporation after it ceased to exist. If we could not get a return from Boss, from whom could we get a return?

Mr. MAGUIRE.—You don't have to get a return from [89—14] anybody. The Government can go into a person's books, and say, This is what you owe us.

Mr. HUMPHREYS.—Then, when we come into court, we cannot prove it.

Mr. MAGUIRE.—Yes, you can.

COURT.—I think the Court will admit that record for what it is worth. There is no objection made to its certification?

Mr. MAGUIRE.—Oh, no, no.

COURT.—The Court will admit it for what it is worth. If there are parts of it not relevant to the inquiry here, the Court will not pay any attention to them.

Mr. MAGUIRE.—Very well, your Honor.

Mr. HUMPHREYS.—Now, your Honor, this is a return: "Name of Corporation, Boss & Peake Automobile Co. 615 Washington Street, Portland, Oregon." This return was made by "C. L. Boss, Part stockholder." This is the form in which the oath is written on the return: "We, the undersigned, president and treasurer of the above-named company, whose return of net income is

herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief, true and correct in each and every particular." Signed, "C. L. Boss, Part stockholder," before "B. B. Weldy, Internal Revenue Inspector." And in general it shows a total income of \$37,668.79; deductions, \$15,118.85; leaving net taxable income of \$22,546.94, and net tax assessable of \$12,405.30. I won't go into all the detail. It is accompanied by an affidavit: [90—15]

"I hereby solemnly swear that my delinquency in filing corporation excess profits for 1917 return as required by Boss & Peake Automobile Co. was not due to any intent to violate the law or to evade taxation, but was due to:

At the time of dissolution no excess profits tax law had been enacted and I attempted to make a return for my share of the earnings of the corporation in my personal return as the return itself and correspondence with the Collector at Portland and the Commissioner at Washington will show.

Desiring to compromise my liability I hereby tender the sum of \$            which I request to be accepted in compromise of the specific penalty only.

(Signed) C. L. BOSS."

Also sworn to before Weldy.

The only other thing I want to read to your Honor at this time—I don't care about these affidavits to which counsel objects so strenuously—is a letter dated August 18, 1920, which your Honor will note is within a few months after the date of the return itself, addressed to the Honorable Milton A. Miller, Collector of Internal Revenue, Portland, Oregon:

“Dear sir: I am in receipt of a notice and demand for tax addressed to Boss & Peake Automobile Company, Form 1-17 Account No. June 23, B6-1 Additional 1917 Income Tax, together with a mimeographed copy of an instruction to Collectors concerning collection of taxes on corporations dissolved before the date of the tax.

From this circular I understand that persons sharing in the assets of corporations at dissolution are obligated to pay in proportion to the assets which they have received. This circular, however, has no application to me because I had sold all my stock in the corporation to Mr. C. L. Boss, and severed my connection with the corporation entirely before its dissolution, and had no part in the dissolution whatever and received no assets of the corporation in such dissolution. My stock was sold to Mr. Boss on June 1, 1917, and by this sale Mr. Boss acquired control of the corporation. I am advised that thereafter Mr. Boss and the other stockholders arranged for the dissolution of the corporation, but of this I know only by hearsay as I had no part in the transaction.

Yours very truly,

E. W. A. PEAKE.”

(Testimony of B. B. Weldy.)

This is merely for the purpose of establishing the demand and the understanding of Mr. Peake that demand was being made upon him for that tax.  
[91—16]

**Testimony of B. B. Weldy, for the Government.**

B. B. WELDY, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

**Direct Examination.**

(Questions by Mr. HUMPHREYS.)

What is your business, Mr. Weldy?

A. Revenue agent, income tax unit.

Q. Did you ever have anything to do with the examination which had to do with the liability of Boss & Peake Automobile Company for a tax?

A. I did.

Q. When did you make that examination?

A. The latter part of February, 1920.

Q. How did you come to make it?

A. I was instructed by the revenue agent in charge to make an examination of the books and income tax return of C. L. Boss Automobile Company, and I found that between the time of the dissolution of C. L. Boss & Company and C. L. Boss Automobile Company there had been a corporation Boss & Peake corporation, and on instruction of the internal revenue agent in charge, I made the examination of Boss & Peake Automobile Company's books.

COURT.—You made that in person?



(Testimony of B. B. Weldy.)

A. Yes, sir.

Q. Now, where did you make that examination?

A. At the office of the C. L. Boss Automobile Company.

Q. Why did you make it there?

A. Because the books were there.

Q. What books did you find there?

A. Well, I couldn't tell you right offhand, but the ordinary [92—17] books found—books of record. I believe there was a cash-book, a journal and ledger.

Q. From your examination of those books, are you able to say what the total income of Boss & Peake Automobile Company, a corporation, was from January 1 to June 30, 1917, or any period included in those times?

Mr. REILLY.—Objected to. The books speak for themselves. We don't want to make this unnecessarily long, but we don't want a mere conclusion of the witness in a matter of this kind.

Q. Did you make a report on that?

A. Yes, sir.

Mr. REILLY.—Where is that record?

A. I think Mr. Humphreys has the photostat of it.

Q. In what form was the record?

A. In my report. You have the photostat there, I think.

Q. Is this your report?

A. Yes, this is my report.

Q. Or is this it?



(Testimony of B. B. Weldy.)

A. Well, that is part of it, perhaps. This is C. L. Boss personally. This is C. L. Boss Automobile Company. There must be one there for the Boss & Peake Automobile Company also.

Q. Is that it? A. Yes.

Q. What was the total amount of the income of that corporation for that period?

A. The books indicate a total income of twenty-two thousand plus during the corporate period.

Q. I asked for the total income.

A. Oh, I don't know what the total income was.

Q. I didn't ask you about the taxable income. I asked you for the total income. [93—18]

A. The total income was \$37,668.79 for 1917.

COURT.—Is that January 1st to January 1st?

A. To June 1, 1917.

(Examination by Mr. MAGUIRE.)

Q. Mr. Weldy, this was a concern that was engaged in the sale of articles of merchandise—automobiles and automobile parts? A. Yes.

Q. In figuring up your return, did you have an inventory of the physical assets of that concern of January 1, 1917?

A. Not that I remember of.

Q. Did you have an inventory as of June 1, 1917.

A. No, sir; I don't think so.

Q. Did you have one as of May 31, 1917?

A. No. It was not necessary, because the books showed that there had been a sale.

Q. Been a sale? A. The business was closed.

Q. Well, if you have a merchandise business

(Testimony of B. B. Weldy.)

which is run upon an accrual basis, as that business was, where there was paper out, debts of various kinds, and credits coming in, how could you arrive as to the net income without having either a beginning inventory or an ending inventory?

A. We simply took the books, the profit and loss account.

Q. You simply took the profit and loss account?

A. Yes.

Q. Now, if you had taken into account—of course, it is not your fault, because they didn't have such an inventory—but without an inventory, both closing and opening, there is no way whereby any one can tell that the profit and loss account is accurate, is there? [94—19]

Mr. LOGAN.—That is making this witness his own witness in this matter. We will submit the books to the gentlemen, and show your Honor just how it was found.

Mr. HUMPHREYS.—If I can only get at a *prima facie* case here, then I would like to wash my hands of it and let counsel go to it.

Mr. SMITH.—Let the record show that Mr. Boss produces his books.

COURT.—I think you better let Mr. Humphreys go on and make the case for the Government, so far as he is able to do it. Then if there is any objection raised to the liability of one party or the other, let that be brought forward by themselves. I think we will get along better that way.

Mr. MAGUIRE.—If the Court will permit me

(Testimony of B. B. Weldy.)

just one thought: You see, we are now getting the benefit of Mr. Weldy's examination and his conclusions. I take it that if we could show, upon a preliminary question, that he was necessarily deprived of the data from which correct conclusions could be reached, the Court would not listen to the testimony in that respect.

COURT.—That is the evidence upon which the Government acted in levying this tax. If the evidence is not sufficient to support the tax, that is another question.

Mr. MAGUIRE.—I see.

Mr. SMITH.—I want the record to show, if the Court please, that Mr. Boss has brought the full records of the transaction of the business of the Boss & Peake Automobile Company into court, offered them to the Government, opposing counsel, or the court throughout this trial, to substantiate any fact sought to be proven. [95—20]

COURT.—You may proceed, Mr. Humphreys.

#### Direct Examination Resumed.

Q. Now, Mr. Weldy, from your examination of the books of the Boss & Peake Automobile Company, you have stated, I believe, what the whole income was during the period mentioned?

A. Yes.

Q. Now, what was the net taxable income during that period?

A. The net taxable income, according to the books, was \$22,142.43, for 1917, and the corrected net income, on which tax was assessed, was \$22,549.94.

(Testimony of B. B. Weldy.)

Mr. HUMPHREYS.—The rate of taxation, I suppose, your Honor will take judicial notice of, being fixed by the statutes at that time. It is not necessary to prove that?

COURT.—What was the rate of taxation at that time?

Mr. HUMPHREYS.—Let me have the return.

A. Here it is. It is 2 and 4 per cent, normal tax.

COURT.—Never mind. I am familiar with that.

Mr. HUMPHREYS.—Two, one and four.

A. Just two and four applies to this.

Mr. HUMPHREYS.—Two and four only applies to this.

Mr. MAGUIRE.—That is normal?

A. Normal tax. Excess profits tax is graduated.

Q. Are you able to state what amount was subject to excess profits tax?

A. The whole amount, less the deductions for invested capital, percentage of invested capital, and a specific deduction of \$3,000 for the year, but it is prorated for the number of months.

Q. What part, if any, of that tax was paid?

Mr. HUMPHREYS.—I suppose there is no dispute that half of [96—21] it was paid?

Mr. MAGUIRE.—There is no dispute that Mr. Boss paid a certain amount of money alleged in the complaint.

Mr. HUMPHREYS.—I mean, half the tax assessed. Half the tax which the Government as-



sessed was paid. I understand that will be admitted?

Mr. MAGUIRE.—Yes.

Mr. LOGAN.—I suppose it will be conceded that it was paid by Mr. Boss?

Mr. MAGUIRE.—Yes, it was paid by Mr. Boss.

COURT.—What was the amount paid by Mr. Boss?

Mr. HUMPHREYS.—\$6,202.65.

COURT.—You are now claiming that same amount?

Mr. HUMPHREYS.—Plus interest and penalty.

Mr. LOGAN.—Since the time.

COURT.—What is that?

Mr. HUMPHREYS.—There was five per cent general penalty and one per cent per month penalty, which of course accrues. Five per cent penalty amounts to \$310.13, and there is one per cent a month from the 15th of August, 1920, which would be approximately about 20 per cent more now.

Mr. LOGAN.—Mr. Boss, on August 17, 1920, paid \$6,202.65. He got a receipt.

COURT.—Was the firm or corporation subject to a penalty under the excuse which was made by Mr. Boss?

Mr. HUMPHREYS.—No, your Honor, the penalty was for the failure to pay the half which has remained unpaid.

COURT.—I see. Very well.

Mr. HUMPHREYS.—The Government did not attempt to impose any penalty on them for failure



(Testimony of B. B. Weldy.)

to pay up to the 15th of August, [97—22] 1920. But the penalty is for the failure to pay the remaining half, which was not paid, from that time on.

Q. Now, Mr. Weldy, can you, with the assistance of Mr. Logan's and Mr. Smith's offer, indicate from the original records that you examined the amount of the whole income, total income of the Boss & Peake Automobile Company, on which this tax was based? A. I believe I can, yes.

Mr. REILLY.—May I ask a question that may expedite matters, possibly?

(Examination by Mr. REILLY.)

Q. Have you your work-sheets available, Mr. Weldy? A. No, sir.

Q. Are they in Portland?

A. Yes, in the revenue agent's office.

Q. Would it expedite matters any to send for them?

A. I don't think it will, Mr. Reilly. I looked over them this morning, and they are just the same as my report. I have not turned anything in except what was shown in the report, so I don't think that they would.

COURT.—Well, now, the question asked, will you answer that? It has not been answered yet.

Q. (Question read.) A. Yes, sir.

Direct Examination Resumed.

Q. Will you do that, please?

Mr. REILLY.—Is the book paged? A. No.

Mr. REILLY.—Tell us the name of the account each time.

(Testimony of B. B. Weldy.)

A. This is Profit and Loss. This book we are interested in in making the examination, this is all written up as of May [98—23] 31, 1917, except the last entry, June 17, 1917. This is an exact copy—or mine is an exact copy of the profit and loss. It shows on one side the expenses and the amount paid to E. W. A. Peake and to C. L. Boss and the surplus account. On the other side it shows the income from Hudson cars, Maxwells, accessories, factory parts, gas and oil, miscellaneous stock, shop and tires. Those are items of income, showing the net income from those sources. The other side shows expenses for advertising, and then the general expense—expense of demonstrators, territory, travel expense, insurance, membership and subscriptions, postage, service, stationery and printing, storage, telephone and telegraph, transferred to E. W. A. Peake, transferred to C. L. Boss, and transferred to surplus account. The total of each side is \$41,524.98. Now, that takes in the earnings and expenses for the entire corporate period. The charge for 1916 I have segregated, and it shows a total of \$3251.98.

Mr. REILLY.—Profit?

A. No. That is the expense account applicable to 1916. Now, in making this examination, I did not retain copies. I could not get any retained copies of returns that had been filed. And in running over the expense account, I discovered an item of \$12.08, representing income tax paid for the year 1916, paid in 1917, and showing a net income

(Testimony of B. B. Weldy.)

of \$604.21. Now, there was no way that I could do, without making a complete audit, to find the earnings for 1916, so I took the expense account and set up a probable earning for 1916, and deducted this expense account, and arrived at the net of \$604.21. The balance all went into 1917. The books did not show the transactions for 1916 separately, as is usual, or the general way is to close at the end of each period; but they were not closed. [99—24] Therefore I could not find the net income for that period in any other way.

Q. Now, how did you arrive at the net taxable income?

A. Well, I deducted the portion for 1916, and the difference I set up as the net income, or the gross income rather for 1917, and deducted the expenses for 1917, and arrived at the net income that way.

Q. What were the expenses for 1917 during that period of June?

A. Expenses for 1917, \$15,526.36.

Q. Of what were they composed?

A. Advertising \$659.47, advertising Hudson cars \$1017.90, advertising Maxwell cars \$978.47, general expenses \$7810.95, demonstrators—expense of demonstrating \$1764.78, traveling expense on territory \$1320.07, insurance \$171.37, membership \$285.61, postage \$208.89, stationery and printing \$195.10, telegraph and telephone \$322.87, storage \$151.92, service \$638.96; total of \$15,526.36.

COURT.—You deducted that from what amount?

(Testimony of B. B. Weldy.)

A. I deducted that from the sales and operations, \$37,668.79. I didn't make any changes.

COURT.—That makes what amount?

A. The net, according to the books would be \$22,142.43, but I found one item of \$395.43 representing furniture and fixtures purchased and charged to expense, which I took out and set up as an assets account. Also income tax of \$12.08, which I eliminated, because the income tax is not deductible under any circumstances as an expense. That left the corrected net earnings of \$22,549.94.

Q. Now, Mr. Weldy, your examination began as of what time?

A. The time the Boss & Peake Automobile Company took over the [100—25] assets of the C. L. Boss Automobile Company, the 28th or 26th day of November, 1916.

Q. And continued until what time?

A. The 31st day of May, 1917.

Q. What caused you to fix that time?

A. The profit and loss showing that at that time the Boss & Peake Automobile Company ceased to do business.

COURT.—What was the date they ceased to do business?

A. May 31, 1917. Well, it is here June 1st, but just one day, so we considered it as of May 31st.

Cross-examination.

(Questions by Mr. LOGAN.)

After that, did you have occasion to go over the



(Testimony of B. B. Weldy.)

books of the C. L. Boss Automobile Company partnership?   A. Yes, sir.

Q. What day did you fix as the beginning of the partnership known as the C. L. Boss Automobile Company?   A. June 1, 1917.

Q. Who composed that partnership, if you know?

A. C. L. Boss and R. J. McRell.

Q. In the return for 1917, how were they allowed with reference to the time of operation, and what deductions were allowed with reference to capital?

Mr. MAGUIRE.—I don't think that is competent.

A. I don't quite get what you want.

Q. What did the Government impose on them as limitation of time of activity?

Mr. MAGUIRE.—Just a moment. If the Court please, limitation the Government might have placed upon their beginnings or endings would not be binding upon any of the [101—26] parties to this transaction. It would not be evidence here in court. The Government investigations do not determine a fact. We are here in court to determine this, and it must be determined by competent evidence.

COURT.—The fact is, that the Government made its account between certain dates, and the termination of the account was on June 1st. That is about all there is to that.

Mr. LOGAN.—That is all there is to it. I want to make it clear, however, that the Government



(Testimony of B. B. Weldy.)

stopped holding the corporation as of June 1st, and commenced the partnership.

Q. Now, Mr. Weldy, did you examine all the accounts in these books? A. Not necessarily, no, sir.

Q. Did you attempt to look in these books, and see whether or not there was any way of finding the profits on any automobile?

A. Oh, yes. I looked all through anything that would give light on the expense accounts or on the income. But I didn't make this as a part of my report.

Q. Were you able to ascertain, in looking over these accounts,—for instance, I refer you to the account of April 2, 1917, under the head of Hudson Motor Car Company, car account, shipment of cars which were sold to J. B. Skinner, Ben Croeni, William Cornfoot and Charles E. Stolte,—are you able to turn forward and see the profit or loss on those accounts?

A. I followed them through at the time. I don't remember just now.

Q. Now, look at the account, for instance, of Mr. Skinner, see if by this account you can tell what profit was made upon that particular car.

A. That would indicate a profit of \$212.29. [102—27]

Q. And the car that was sold to Mr. Croeni?

COURT.—Do you propose to follow that through with each individual car?

Mr. LOGAN.—No, your Honor. I just show these as sample cars, so the gentlemen on the other

(Testimony of B. B. Weldy.)

side can test this out. I was just asking this gentleman because he was asked by Mr. Maguire a few minutes ago as to the showing of profit on each car. I will go into that in detail later on.

Q. Does the same thing show with reference to Mr. Cornfoot? A. Yes, sir; \$385.39.

Q. And Dr. Stolte?

A. That was \$283.16 profit.

Q. Do you know whose handwriting that is?

A. No, sir.

Q. Did you have occasion to look into the question of any division of profits, or anything else with reference to wages or salaries, between Mr. Boss and Mr. Peake? A. Salaries are an expense.

Q. I will ask you to look at what is known as the combined cash and journal under the heading June, 1917, folio 120—there seems to be no other way of designating it. I will ask you to read to his Honor.

Mr. MAGUIRE.—We object to this evidence as not being made by the defendant Peake, nor at a time when he had any control over the books or the manner in which Mr. Boss conducted the business; therefore, being a self-serving declaration on the part of Mr. Boss, not binding upon Mr. Peake.

Mr. LOGAN.—We will connect it up, your Honor, with Mr. Murphy, Mr. Peake's witness, who was there at that time and thereafter, and it is in the handwriting of Mr. Murphy, [103—28] the then bookkeeper.

COURT.—You propose to establish by your own

(Testimony of B. B. Weldy.)

testimony, I suppose, the accounting between Mr. Boss and Mr. Peake?

Mr. LOGAN.—Yes, your Honor.

COURT.—Why inquire of the revenue officer about that? You know more about those books than the revenue officer knows. He had nothing to do with that business. Are you attacking the accuracy of his report?

Mr. LOGAN.—No, your Honor.

COURT.—Then I don't see why you put that in.

Mr. LOGAN.—All right. We will show that later.

Mr. SMITH.—There is one fact, if the Court please, that I think we can agree on. I would like to ask the attorneys for Mr. Peake whether they will agree that from June 1, 1917, and for the remainder of the year, the income tax in all of its phases upon this business was paid by the new partnership of Boss and McRell, under the name of the C. L. Boss Automobile Company?

Mr. REILLY.—We don't know anything about it. If you can prove it, prove it.

COURT.—Are you through with the cross-examination?

Mr. LOGAN.—Yes.

Cross-examination by Mr. MAGUIRE.

Q. Is it a matter of fact, Mr. Weldy, that, under the Government regulations, it is held to be essential, in making a return upon an accrual basis, as you have made here, you have both the initial and final inventories?

(Testimony of B. B. Weldy.)

A. No, sir, not when it is the closing, at the end of a corporate period. If it was just in between time, we would have to have that information. But the books showed, as a [104—29] complete transaction, the purchase of the assets from C. L. Boss & Company at the beginning of the corporate period, and at the end of the corporate period it was closed out, and it was not necessary to have an inventory at either time.

Q. Well, now, Mr. Weldy, what became of the physical assets? What do the books show became of the assets at the end of the corporate period, May 31, 1917? What do the books show about that? A. I cannot tell you.

Q. Then, what was the value of the physical assets at the end of the corporate period?

A. I don't know that, because it was not necessary to see that for my purposes. The profit and loss showed it was closed. It was a closed transaction—there were no assets.

Q. Let us have the books—perhaps I don't quite understand you. I am not a bookkeeper, so I kind of have to have you help me out on this.

A. I will be glad to, if I can.

Q. You say the profit and loss account shows it was closed out? A. Yes.

Q. Let us turn to that, so I can get that clearly in my mind.

A. You see here, transferred to E. W. A. Peake \$10,000; to C. L. Boss, \$11,373.32; to surplus ac-



(Testimony of B. B. Weldy.)

count, \$1,373.32. It closes up the whole thing. There is nothing to carry over at all.

Q. Profit and loss account never does carry your merchandise articles, anyway, does it?

A. Not necessarily, no.

Q. No. A man might close out a profit and loss account and still have an inventory there of many thousand dollars? A. Sure, they can do that.

[105—30]

Q. Now, what I am getting at, was the merchandise carried over into profit and loss?

A. The merchandise account will show that.

Q. Well, that is what I am getting at.

A. I don't know where it is now. Here is the merchandise account. That doesn't go that far. Miscellaneous stock. There doesn't seem to be any division here. The books were not closed. Here is a demonstrator car, for instance, taking as total of \$837.86 as May 31, 1917, and the account continues on. I think the whole thing is the same way right straight through; that they were not closed. We frequently find that in our examinations.

Q. Isn't it a matter of fact that all of the accounts in there, with the exception of profit and loss account and E. W. A. Peake's personal account, continued right straight along after the 31st of May?

A. I won't say one way or the other, but I presume they were.

Q. All you have seen, all you find there, that is what happened, wasn't it?



(Testimony of B. B. Weldy.)

A. Naturally; there's lead pencil figures.

Q. Now, is there anything there in those books to distinguish between the business of Boss & Peake Automobile Company and the C. L. Boss Automobile Company?

A. Well, what I went by was the profit and loss accounts for the two concerns, one up to the 31st of May, and the other from June 1st to the end of the year. And all the way through here the pencil figures show the amount at May 31, 1917.

Q. Is there anything to indicate when those pencil figures were put in there?

A. Usually at the end of the month? [106—31]

Q. At the end of each month, aren't they?

A. Yes, they are at the end of each month.

Q. Now, let me ask you this further question: In determining whether or not that was the net profits of that concern, the profit and loss account would not accurately show it unless you knew whether the merchandise accounts at the end of the time were greater than they were at the beginning?

A. Where is that black book? This shows May 31, 1917, the inventory on hand—the goods on hand.

Q. Yes, that shows the goods on hand. Now, then, where is the date on that? A. May, 1917.

Q. Is there anything to indicate there the date upon which these entries were made?

A. Not any more than May.

Q. Than May on the opposite page?

A. Yes. Here is June, 1917, page 160.

Q. Now, then, is there anything to show what the

(Testimony of B. B. Weldy.)

merchandise accounts were on the first of January, 1917?

(Objected to as incompetent. This is an income tax on profit, not on merchandise, and this account shows the profit.)

Mr. MAGUIRE.—I have spent a good deal of time the last three or four years trying to find out how to make income tax returns.

COURT.—I understand you to contend that the profit and loss account does not accurately show the profits?

Mr. MAGUIRE.—It is not a reflection of income. Under the system of accounting adopted by the Government, a profit and loss account is not any data at all. If you are selling merchandise, you have your inventories as of the time of the [107—32] beginning of a period, your purchases in the period, your inventories at the end of the period.

COURT.—Notwithstanding, the Government has through this witness determined the income account from profit and loss.

Mr. MAGUIRE.—It is guessed at, your Honor. That is exactly what we are getting at.

A. When the profit and loss is in balance we very seldom question it, and we take that as our starting point. Now, here is inventory 11/25, 1916, showing what Boss & Peake Automobile Company purchased from C. L. Boss & Company. It was not necessary to have an inventory at the beginning of the period, because it was all purchased, and it would have been just the same if it was all purchased in one day

(Testimony of B. B. Weldy.)

from C. L. Boss & Co. or Hudson Motor Car Company, or any other concern, or whether it was purchased during the period that the corporation was in existence.

Q. What I am getting at is this, Mr. Weldy: When the corporation started in the business, it set up the amount of its merchandise on hand, didn't it? A. It should have.

Q. Isn't that what it did?

A. This purports to be.

Q. Now, does it also show up here the amounts of purchases since that first entry?

A. Well, I couldn't tell you whether it does right in here or not; but the merchandise accounts and the car accounts showed each car, or each transaction.

Q. Did they show the parts?

A. There is a parts account here, is charged to purchases during the period, but the books were not closed as stated before December 31, 1916, so the only way we could do would [108—33] be to take the amount necessary after deducting the expenses. We knew the expenses, and we knew the profit that they had estimated or set up as being \$604 and some cents, and by taking the amount necessary to make the income reflect that amount of net profit, that is the difference, and the only thing that I guessed at—

COURT.—You explained that a while ago.

Q. That is merely an arbitrary figure that you assumed, wasn't it?

(Testimony of B. B. Weldy.)

A. Naturally so. You couldn't get at it any other way.

COURT.—That is the only way he could get at it.

Mr. MAGUIRE.—I know. But if he could take one arbitrary figure, your Honor could take another, and I could take another, and each of us would be equally right.

COURT.—I presume the Government had a right to do that from the books, if the books were in such shape they couldn't arrive at it accurately and absolutely; that they did have a right, not to take an arbitrary account, but to take what evidence they could get at in order to determine as nearly as possible what the real figure ought to be; and that is what they did?

A. Yes, sir. Now, there is no question but what the Boss & Peake Automobile Company filed a return covering the period from November to December 31, 1916, because they paid a tax on it. We have no record of it. All the returns are sent in from this office, from the collector's office, to Washington. And it also shows some place that there was a "No tax" income tax return filed for C. L. Boss Automobile Company later, covering the period from January 1 to May 31, 1917.

Q. No tax? A. No tax. [109—34]

Mr. MAGUIRE.—Well, now, just a moment. If Boss & Peake Automobile Company made a return for 1916, that return had to be made through your office, didn't it?



(Testimony of B. B. Weldy.)

A. No, sir. We have nothing to do with the collector's office at all.

Q. Oh, I misunderstood the situation.

A. It was filed in the collector's office, but we are the revenue agent's office, and have nothing to do with the collector's office.

COURT.—Now, again, what was the date the Boss & Peake Automobile Company came into existence?

A. In November, 1916. The corporate period was from November 8th, but they did not take over the business of C. L. Boss & Company until November 26th, I believe, 25th or 26th.

Mr. LOGAN.—25th, if you will permit me.

COURT.—As far as your return shows, that corporation continued until what date?

A. Until May 31, 1917.

COURT.—I understand it now.

Q. Just a minute, Mr. Weldy: Do you know when that corporation dissolved? A. Yes.

Q. When? A. In June, 1917.

Q. What date in June? A. The 17th, I believe.

Q. No, is there any difference there in the way those books are kept from the 1st of June up to the 17th? A. No. It is not necessary.

Q. I didn't ask you that. I asked you whether there was any. A. No, I have said. [110—35]

Q. Now, then, how much parts did they have on hand there on the first of June?

Mr. SMITH.—Objected to as incompetent, irrelevant and immaterial.



(Testimony of B. B. Weldy.)

COURT.—I think you better prove that independently.

Mr. MAGUIRE.—Well, I cannot, your Honor. These are not our books; we didn't have charge of them—haven't got charge of them.

Mr. LOGAN.—We are willing to let you have the books. Your witness, Mr. Murphy, is the man who kept the books. You can have Mr. Murphy go over them.

Mr. SMITH.—It is incompetent, irrelevant and immaterial in this case, because the Government is only suing for income tax down to May 31st. Now, if the Government has a greater demand, it is not involved in this case. It stops on June 1st, whether the corporation was dissolved or not.

Q. The question was, how much merchandise in parts did they have on the 1st of June?

(Objected to.)

A. I cannot tell you.

Q. Can't you give us the value of it? Doesn't that reflect in the books?

A. It may be reflected in the books; but if it is reflected in C. L. Boss Automobile Company as a purchase, it was not necessary for the C. L. Boss Automobile Company to set up an inventory as of June 1st, 1917, when they began business, because they purchased this stock.

COURT.—He has been over that.

Q. Now, where does it show that C. L. Boss Automobile Company purchased any parts? That is what I am getting at. [111—36]

(Testimony of B. B. Weldy.)

A. I don't know whether I can show you that or not. I am not familiar with these books.

Q. I am afraid you are getting the idea I am trying to get you. I am trying to get facts.

A. Understand I didn't keep the books.

Q. No, I know you didn't. I am not holding you responsible for it.

A. I cannot tell you anything about it.

COURT.—I think if you have a witness of your own who is familiar with those books, you better produce him.

Mr. MAGUIRE.—I haven't, your Honor.

COURT.—It has been suggested that you have.

Mr. LOGAN.—Mr. Murphy, your witness, kept those books.

A. I am not familiar enough with these books to show these things. I was not interested in it at that time.

Q. I won't ask you to take that trouble. I notice here in your list of deductions from the gross sales that there is nothing allowed there for salaries of the officers. How did you handle that, Mr. Weldy?

A. There is allowed for salaries of officers \$2008.34, which is all they claimed.

Q. That is not part of the \$15,526.36, is it?

A. Yes. It is the second item.

Q. My items are \$659.47, \$1017.90—

A. Those are expense accounts. That does not necessarily take in the officers.

Q. That is what I am getting at.

(Testimony of B. B. Weldy.)

A. That is charged to another expense, general expense, I think, in this book, or in the profit and loss it was general expense. I segregated it, and allowed the officers \$2008.34, [112-37] which was all they claimed.

Q. Was that \$2000 taken out of the net income?

A. Oh, yes.

Q. What was the amount that you allowed there?

A. It was \$2008.34.

Q. That was the total?

A. Yes; at the rate of \$175 a month, I believe. There was six weeks in 1916 and five months in 1917. I think it will figure out right.

Q. There was still a net income of \$22,549.94 after allowing all that? A. Yes, sir.

Q. Now, then, did you call Mr. Boss' attention to the fact that there had been no corporate return made? A. I did.

Q. Was that before or after he had made a partnership return?

A. Oh, he made a partnership return in 1918, covering the period from June 1st to December 31, 1917.

Q. Now, your examination was made in February, 1920? A. Yes, sir.

Q. Did you make any inquiry of Mr. Peake as to the facts with regard to this matter of the taxation, or the figures of taxation, or the transaction between these parties?

A. I did not. I never saw Mr. Peake until today.

(Testimony of B. B. Weldy.)

Q. The information you got you obtained through Mr. Boss?     A. And the books.

Q. And from the books themselves—I see.

(Questions by Mr. LOGAN.)

Q. I notice Mr. Boss signs this return as one of the stockholders, or part stockholder. What explanation did he make [113-38] to you at that time?

Mr. MAGUIRE.—That wouldn't be competent, your Honor,—a self-serving declaration.

COURT.—Did he talk to you at that time?

A. Yes, sir.

Q. You had seen him sign this, did you not?

A. Yes.

Mr. LOGAN.—This is a government's exhibit.

COURT.—You may answer that question.

(Exception allowed.)

A. That the corporation had been dissolved; there were no officers.

Q. Now, you stated that they drew a salary from the 25th of November, 1916, down to the 31st of May, 1917?     A. Yes, sir.

Q. Did you find any place in the books where that was set forth?     A. I couldn't say right off.

Q. I call your attention to this account right here—I believe in Mr. Murphy's handwriting—salary account. What about that? Did you see these items here?     A. I did; yes, sir.

Q. Did you see this item here—"E. W. A. Peake, Capital Account, \$15,000"?     A. Yes, sir.

Q. Did you see Ditto "Salary Account, \$1079?"

(Testimony of B. B. Weldy.)

A. Yes—81 cents, I think, or 51; something like that.

Q. Did you see this item here, Ditto “Earnings \$11,255.31”?

Mr. MAGUIRE.—That is the same matter you went into before, the Court said it was improper. [114-39]

A. Yes, I looked all over those.

COURT.—Let me ask you another question, to clear up my mind.

(Examination by the COURT.)

Q. This return was made by Mr. Boss as a corporate return? A. Yes.

Q. And not a partnership return?

A. No, no. Corporate return.

Q. The corporation ceased to exist on May 31?

A. Yes, sir.

Q. And this return runs down to June 1st?

A. This return was made out March 1, 1920, after I got through with my examination.

Q. It included the period of time from January 1, 1917, until June 1?

A. No, just including May 31st.

Q. May 31st? A. Yes, sir.

Q. That is the date, now, that the corporation turned over its property?

A. Mr. Boss told me at that time it was after business hours, if I recollect right, on May 31st, and it was of June 1st; but frequently, where we find just a day or so, we close with the end of the month.



(Testimony of B. B. Weldy.)

Q. That the assets or the property of the corporation were turned over to—

A. C. L. Boss Automobile Co., yes, according to my information.

Q. That is all.

A. Now, in this case, to explain, where we find that there was return made, then we get an amended return. That is what this is. And we also got a return that Mr. Boss signed as a delinquent return covering the excess profits tax. [115-40]

COURT.—Yes, I understand that. It is for that period? A. For that period, yes, sir.

Mr. MAGUIRE.—Where did you get the information that on June 1st these assets were turned over to the partnership? There isn't anything on the books to show that, is there?

A. I took Mr. Boss' word for that, I believe.

Mr. MAGUIRE.—Then we move to strike that testimony from the record as being hearsay.

Mr. LOGAN.—We will connect it up, your Honor. If we don't, it may be stricken.

COURT.—The Court won't consider incompetent testimony. I was trying to find out the exact period covered by the return.

Mr. MAGUIRE.—Oh, I see what your Honor had in mind.

#### Redirect Examination.

Q. Do I understand that you had, previous to February, 1920, made an examination of the books of the C. L. Boss Automobile Company?

A. No, sir, I think that was later. That was

(Testimony of B. B. Weldy.)

after I made the examination of Boss & Peake Automobile Company. But it was all at the same time, and my recollection is that I made examination of Boss & Peake Automobile Company first, and then C. L. Boss Automobile Company later.

Q. Well, but the examination that you made of the C. L. Boss Automobile Company, was it for the period both preceding and following the time of the business of the Boss & Peake Automobile Company, or for only one of those periods?

A. Oh, just following.

Q. Following? A. Yes.

COURT.—That is, beginning June first? [116-41]

A. June 1st, and continuing that year and the next year. We were only making examination for 1916, 1917, and 1918 at that time.

Mr. HUMPHREYS.—That is all.

Mr. SMITH.—There is one entry I wanted to call to the attention of the witness, if the Court please, a question brought out by a question of Mr. Maguire's, as to whether these books showed the date as of which these entries were made when the matters were closed.

(Examination by Mr. SMITH.)

Q. I call your attention to this combined cash and journal, page 120, the items "ditto" beginning with "E. W. A. Peake, Capital Account, \$15,000." Immediately under that "Do Saly a/c."

A. Salary account, \$1079.17.

Q. Immediately under that "Do"—

COURT.—You have been over that, haven't you?

(Testimony of B. B. Weldy.)

Mr. MAGUIRE.—Three times now.

Mr. SMITH.—No.

Mr. REILLY.—They have asked the witness “Did you see this?” Now, they are asking him of what date it is in the book. The book speaks for itself. The witness has been over it time and time again.

Q. What I want is the “Earnings 11/25 to 5/31, \$10,000.” Was that in there when you examined it? A. Yes, sir.

Mr. MAGUIRE.—There is no subdivision made there from that date on, is there, in your combined cash book and journal, or in your ledger sheet? A. No, sir.

Excused. [117—42]

Mr. HUMPHREYS.—If your Honor please, counsel are willing that whatever evidence either of the defendants may introduce touching the question of actual dissolution of the corporation may be considered part of the Government’s case. I rest, with that understanding.

COURT.—I suppose you would be entitled to that anyway.

Mr. HUMPHREYS.—Very well, your Honor.

COURT.—As part of this case.

Mr. HUMPHREYS.—Under the theory of the complaint, I ought to make some kind of showing about that. I don’t want to do that, because I don’t want to attempt to put on part of Mr. Logan’s case. I don’t want to attempt to put on part of Mr. Maguire’s or Mr. Reilly’s case.

COURT.—Very well. That will be very satisfactory. It will relieve the parties of duplication of testimony.

Mr. HUMPHREYS.—Yes, your Honor. Then the Government rests at this time.

COURT.—Very well.

Adjourned until 10 A. M.

Government rests. [118—43]

Portland, Oregon, May 23, 1922, 10 A. M.

**Testimony of C. L. Boss, in His Own Behalf.**

C. L. BOSS, called as a witness in his own behalf, being first duly sworn, testified as follows:

Mr. REILLY—If the Court please, we were given an opportunity to inspect the books of the Boss & Peake Automobile Company last night, and we find missing from them the capital account; the account of C. L. Boss, capital, and the account of R. J. McRel, capital, and we wish to make demand upon the defendant Boss and the defendant Boss & Peake Automobile Company to produce those sheets from the ledger. They are referred to elsewhere in the books, so that there cannot be any doubt of their having been in there.

COURT.—Do you object to that?

Mr. SMITH.—No. We will produce everything we have. The books are in the same condition they were when I came in the case day before yesterday.

Mr. LOGAN.—We will produce all sheets available to us. I don't know whether we have those sheets or not.



(Testimony of C. L. Boss.)

COURT.—The Court will make the order to produce them as far as you can.

Mr. LOGAN.—I would like to have produced here all the papers Mr. Peake has with reference to negotiations between himself and Mr. Boss—particularly the check which he gave to C. L. Boss Automobile Co. on the first day of June, 1917.  
[119—44]

### Direct Examination

(Questions by Mr. SMITH.)

Mr. Boss, in giving your testimony you will find frequently that the passing street-cars make a lot of noise, and it is a little hard to understand in this room. Please speak up plainly. Kindly state your name.

A. C. L. Boss.

Q. Where do you reside, Mr. Boss?

A. 374 Multnomah Street.

Q. And your occupation, please?

A. Automobile dealer.

Q. How long have you been in that business?

A. Since November, 1911.

Q. Where have you been in that business since that time? A. At 615–617 Washington Street.

Q. Here in Portland, Oregon? A. Yes, sir.

Q. When you first started in business, Mr. Boss, were you in a partnership or a corporation?

A. Partnership.

Q. What was the name of it?

A. C. L. Boss & Company.



(Testimony of C. L. Boss.)

Q. How long did that C. L. Boss & Company continue in business?

A. Until November, 1916, when the corporation of Boss & Peake Automobile Company started in business.

Q. Now, when the Boss & Peake Automobile Company started in business, you were one of the stock subscribers, I believe the pleadings admit?

A. Yes, sir.

Mr. SMITH.—I will state, if the court please, the pleadings admit that Mr. Boss had 149 shares and Mr. Peake 149 shares, and there were two other shares owned by [120—45] individuals, that are immaterial in this case. Those shares were of the par value of \$100 each.

COURT.—Very well. It is not necessary to prove that further.

Q. Now, in the organization of the Boss & Peake Automobile Company, how was your capital stock paid for? A. Paid for in cash.

Q. And how was Mr. Peake's paid for?

A. Paid for in cash.

Q. What transaction did the Boss & Peake Automobile Company have with the old C. L. Boss & Company in regard to acquiring some of its stock or automobiles or merchandise?

A. After the Boss & Peake Automobile Company put up this \$30,000 they purchased the live, going assets of C. L. Boss & Company. They didn't purchase the old book accounts, or the old used cars. They bought the new automobiles, furniture, fix-

(Testimony of C. L. Boss.)

tures, tools, and such live merchandise, everything that the institution had with the exception of the old notes and accounts, and the old liabilities and the old second-hand cars. They started in business in the same building, with the same force, and it was like staging another play in the same opera house. The business that had been worked up on account of the Super Six automobile, which then dominated in the market, continued good from the start, as shown by the Government report. We made money in the winter-time in the automobile business, which is exceptional, and made money from the start right through.

Q. With the Boss & Peake Automobile Company?

A. With the Boss & Peake Automobile Company.  
[121—46]

Q. How long did the Boss & Peake Automobile Company stay in the automobile business itself?

A. Until May 31, 1917.

Q. That is approximately seven full months, or six months?

COURT.—Until May 31st? A. May 31, 1917.

Q. Did the Boss & Peake Automobile Company quit selling automobiles and practically cease business at that time? A. Yes, sir.

Q. Now, I wish you would tell the court, in your own way, the circumstances under which the Boss & Peake Automobile Company ceased selling automobiles and ceased carrying on its business. First, let's get back a little of your own management of your corporation to show the Court the situation

(Testimony of C. L. Boss.)

there. After you and Mr. Peake became associated, what part of the business did he look after, and what part did you look after?

A. I attended to the part of buying and selling automobiles. I went to the factory and negotiated a contract, and promptly on return of my stock in the factory we put up the money, \$30,000, \$15,000 each, and took over the live assets of C. L. Boss & Company, and continued in business right along from that time. The old company had a good organization of dealers throughout the State. These dealers we signed up on the contracts, which is customary, new contracts each year, at the beginning of the fiscal year. We closed up—what is called closing up the territory, allotting each dealer his territory, making contracts in triplicate, which were sent on to the factory for their approval, and then they were returned to us, the factory keeping one copy, we keeping one copy, and the dealer keeping one copy. We continued at that time selling automobiles at retail, and [122—47] the business remained very active in the winter on account of the dominating car, the Hudson Super Six.

Q. Now, what part did Mr. Peake have to do in the management and the active work of carrying on the business?

A. Mr. Peake, according to agreement, was to finance the automobile business, and he practically took charge of the office, directed the bookkeeping and handling of the finances of the corporation.

Q. Did he have charge of the office force?

(Testimony of C. L. Boss.)

A. Yes, sir.

Q. Now, before Mr. Peake went in with you in the Boss & Peake Automobile Company, before the corporation was formed, did you and he have any talks about what you would do in case you could not get along well, or how you would divide the assets and split up or quit?

A. There were many negotiations before we entered the business. The different points were taken up between us, and there was a verbal understanding between us that there would be no obligations assumed that we could not at the end of the year, or such time as we decided, dissolve and distribute our assets, that there would be nothing that would stand in the way of our dissolving or ceasing to be and do business together. The matter was taken up in such a way that I was to furnish \$15,000, Mr. Peake was to furnish \$15,000, and personally he would, if he chose, finance the business personally out of money that he wanted to loan to it, or else we would borrow money from the bank. That was optional with him, but he agreed to furnish up to \$50,000 in case that we necessarily required it. Now, in the automobile business, in order to make a success of the business, a person has got to have a flow of automobiles continually, and the contracts with the dealers were very full. [123—48] The dealers' wants were large, and they were taking cars in the winter time, as well as delivering them here, and so, feeling that we had a good thing, I ordered automobiles to take care of the business,



(Testimony of C. L. BOSS.)

based upon that judgment and experience of an automobile dealer. These automobiles came in—

Mr. REILLY.—I object to this as not responsive to any question.

COURT.—I think it is covering this question rather elaborately.

Mr. SMITH.—Very well.

Q. Now, after you and Mr. Peake were associated in November, and about the following March, did you have any talk with him about dissolving or quitting your association with him and distributing the assets?

A. We had a number of conversations in which I asked Mr. Peake to allow me to run the business along the lines that we originally laid out.

Mr. REILLY.—Objected to as not responsive to the question. I move that it be stricken.\*

COURT.—Just answer the question as directly as you can without going into explanation.

Q. (Question read.)

A. It was a little later than that that the distribution and the dissolving came in.

Q. Tell how that came up, and tell us all about the conversation with him then at the time he refers to.

A. Mr. McCornack, the Field Manager of Husdon Motor Car Company, made a trip here to the coast, and during Mr. McCornack's trip Mr. Peake came to the depot and met Mr. McCornack in the presence of Mr. McRell and myself. And [124—49] while there at the depot Mr. Peake made overtures



(Testimony of C. L. Boss.)

to Mr. McCornack to get the Hudson contract, and Mr. McCornack asked Mr. Peake what he did in the business; and after Mr. Peake had explained, he said, "I understood you to be a financial man, and as a financial man I think your time would be worth more than what you have done in the business." And Mr. Peake made representations, and Mr. McCornack said that if Mr. Peake quarreled with me he would not be quarreling with me, he would be quarreling with the Hudson Motor Car Company. After Mr. McCornack left to board the train, I turned to Mr. Peake and I said that I noticed that he was blocking our distribution, our dissolution and distribution again, and he said, "How so?" I said, "By taking the cash of the corporation and putting it in notes that the bank was carrying"; and Mr. Peake said, "I will take notes, title notes on all the new Hudson cars, so that the distribution and dissolution can be completed. I will take the physical assets. I will take the automobiles of the corporation, and sell them to you boys, and take the title note, and loan you boys the money on the very automobiles so that the dissolution and distribution can be completed."

Q. At that time what other thing was said, if any, as to how you would arrive at what sum he should be paid?

A. Mr. Peake said, "In doing so I must have my salary; I must have my capital, and I must have my net profit, which I estimate—the net profit I estimate to be \$20,000 after allowing over \$2,000 for

(Testimony of C. L. Boss.)

profit and loss on the notes that were indorsed, the service on the cars that were out, and the incidental bills that were not in. Experience had taught us by keeping record of the business constantly—  
[125—50]

Mr. REILLY.—Objected to, as the voluntary statement of the witness is not responsive to the question; merely argumentative; not a statement of any fact.

COURT.—Just answer the questions.

Q. You state, Mr. Boss, that he asked for his salary, his capital and his net profits.

A. His estimated net profits.

Q. You have already told about the cars. Now what about this salary. How was that arrived at, and in what way had it been carried on the books, if at all?

A. Mr. Peake had had Mr. Murphy credit himself and myself a salary.

Q. How much?

COURT.—Who was Mr. Murphy?

A. Our bookkeeper. It was not authorized by the corporation; had never been authorized; and I wanted to draw my salary, and because it was not authorized by the corporation I felt as if I could not draw it.

Mr. MAGUIRE.—Pardon me, Mr. Boss. It is utterly impossible to hear you over here.

A. I am afraid I am hollering at the Judge.

COURT.—Raise your voice so they can hear. They have a right to hear.

(Testimony of C. L. Boss.)

Q. Did you agree to that with him, to allow the salary? A. At the depot.

Q. At the depot; in this settlement and distribution?

A. His proposition that he put forth was accepted; and at the time that it was put forth I said, "As of June 1st." This was May 21st. [126—51]

Q. 31st, wasn't it?

A. No, the proposition made at the depot was May 21st; either May 21st, May 22d, or May 23d; and in checking back and looking at the calendar I think it was May 21st.

Q. Anyway, you accepted the proposition that he made? A. Yes, sir.

Q. Now, what did he mean by withdrawing his capital? What sum was agreed upon for that?

A. The \$15,000 that he put into the business; the salary that was credited.

COURT.—That he put into the business—he or we? A. That he put into the business.

Q. And you say he spoke of his part of the net profits?

A. His estimated net profits. The estimated net profits, that he himself estimated.

Q. Were you with him when he made that estimate?

A. The estimated net profits were brought about—were taken from preliminary statements, supplementary statements, that we carried from time to

(Testimony of C. L. Boss.)

time. Now, then, if you let me explain that, I will take the book and explain it.

Q. I will ask you to explain to the Court what you mean by those supplementary statements, and to take whatever book—which book do you wish?

A. I want to take the ledger there—that one with the papers in. A carload would be shipped from the factory, and it would be entered under the Hudson Motor Car account. For example, on February 23, 1917, a carload of four Hudson automobiles was shipped, arrived here on April 2d; paid for in cash for \$4829; carried on the other side of the [127—52] account by the number of each automobile, and the man's name it went to.

COURT.—How much was the price?

A. Of the carload? The factory price was \$4829.90. Now, then, those automobiles—four automobiles to a carload.

Q. Now, there would be another account called the sundry account, and each one of those automobiles that appear under this number and name would be entered in the sundry account?

A. This carload was sold to Mr. Skinner, Mr. Croeni, Mr. William Cornfoot and Mr. Stolte. Against each one of these automobiles was charged the unloading charge, the freight, the commission to the salesman, the gas and oil in servicing it, and every item that entered into that. If it was a used car, the used car was charged, and the expenses on that. On this carload that they had in question, the records show we made \$212.29 on the



(Testimony of C. L. Boss.)

automobile that went to Mr. Skinner. We made \$236.02 on the automobile that went to Mr. Croeni; to William Cornfoot we made \$385.39; and to Mr. Stolte we made \$283.16.

COURT.—You made that net, after taking out the overhead charges?

A. Expenses; yes, sir. Now, then, those amounts were thrown into another account called Super Six merchandise, and they are itemized right down here in a row. Now, then, by taking the automobiles as they came there and were delivered, and having the individual profits on each automobile, this account showed there was a profit made on Hudson Super Six cars. The Maxwell accounts the same way, profit on Maxwell automobiles. In addition to those accounts, we also had [128—53] accounts where we would go out and pick up parts, and we had a record of that, and that would show; and then we had a factory parts account; and that would show the profit on it. Then we had a shop, and that would show the profit on it. And we had —if you will get me the other book, please.

Q. What book is this I now hand you?

A. Journal.

Q. What book have you been referring to?

A. Ledger.

Q. Now, referring to the journal, continue your explanation as showing the facts you took into consideration.

A. The different accounts on which a profit was ascertained as we continued in business, were the



(Testimony of C. L. Boss.)

Super Six merchandise account, the Maxwell merchandise account, Accessory account, factory parts account, gasoline and oil account, miscellaneous stock account, shop, and tires.

Mr. REILLY.—What page are you referring to?

A. That is page 159—a of the Journal.

Q. Do you have a corresponding entry of the expenses in this same book that you are just referring to?

A. Yes; in the ledger we kept our expense account, advertising expense; that was subdivided. Then general expense, demonstrator expense, territory expense, insurance, membership, subscription, postage, service, stationery, storage, telegraph and telephone. Those expenses were altogether different from freight, commission, gas, and oil that went into the car. So that by keeping the supplementary statements taken off from our books from time to time, we would know at all times, that is, weekly, or semi-weekly, or daily, if we wanted it, just where we stood. I [129—54] had a large package of those supplementary statements, the final closing statements and memoranda attached, which I delivered over to the Federal people when they came in to check the books, Mr. Butterfield and Mr. Weldy. He remembers I never received them back again. I don't know where they have gone.

COURT.—You have some copies in your books there, haven't you, supplementary statements you have just referred to?

(Testimony of C. L. Boss.)

A. Supplementary statements were taken from these records. You could take it—at any time you could draw it off. We kept those supplementary statements at all times so we could tell where we were at.

Mr. REILLY.—They are not in the books, supplementary statements?

A. No; they were delivered over to Mr. Weldy, the Government official, and all my memoranda and all my finishing statements were turned over to the Government—Mr. Butterfield and Mr. Weldy had them—when they came in to check our books. I said, “Here they are, and here is the room”; and all the office force was at the service of the Government. Everything we had was turned over to them; and I didn’t get them back again.

Q. Well, now, then, Mr. Boss, will you tell us, please, which books, which accounts, what statements you and Mr. Peake went over together in getting at this estimate of \$20,000 profit, and of which you say he got half and you half?

A. Just before we met at the depot this record was brought up and this record showed a little over \$22,000 profit. [130—55] Mr. Peake said at the depot he estimated there would be \$20,000 net, that allowing for the running service that we gave on automobiles that were delivered, current bills that could not be kept in there because they were not in, and the expense on the assigning of these notes that we had sold to the Western Bond & Mortgage Company and the bank. The profit and

(Testimony of C. L. Boss.)

loss on those accounts would leave, taking that off, would take it down so there would be \$20,000 net.

Q. Now, these books that you have referred to, are those the regular books of the Boss & Peake Automobile Company corporation? A. Yes, sir.

Q. And these entries that are referred to, do you know who made them? A. Mr. Murphy.

Q. He was the regular bookkeeper.

A. Who was acting for the Boss & Peake Automobile Company during that entire period of its existence.

Q. In whose handwriting are these pages to which you have referred, page 159-a and 159-b?

A. Mr. Murphy's, the closing entries of the Boss & Peake Automobile Company.

Q. Now, in whose handwriting were those entries made to which you referred a few minutes ago in explaining to the Court the method of keeping the books of the shipment from the factory, and the distribution to the purchaser?

A. That was his—some of these are his, and these filling in statements here are nearly all his; and there is some of the freight that is put in by Miss Healy, that used to work for [131—56] him as his assistant.

Q. What I am after is, whether all of these entries to which you have referred are regular entries by the regular office force of the Boss & Peake Automobile Company? A. Yes, sir.

Q. Now, Mr. Boss, following that conversation with Mr. Peake, you say you accepted his terms for

(Testimony of C. L. Boss.)

the dissolution and distribution?      A. Yes, sir.

COURT.—Now, what were those terms; state it again.

A. He said, “I must have my salary.” You see, it had never been authorized. “I must have my capital, and I must have—”

COURT.—That is the \$15,000?

Mr. SMITH.—Yes, your Honor.

A. “And I must have my profits, which I estimate in the business to be \$20,000, \$10,000 to each.” And I said, “As of June 1st?” And he said, “Yes.”

Q. Do you remember what the amount that he claimed totaled? What did it add up to?

A. That was, in the transaction we took the desk and the chair, and the total amount was \$26,137 and some cents.

Q. Now, was there any entry made in this book which I now hold, the combined cash and journal, of how those sums were made up?

Mr. REILLY.—The entry you are about to read from is under date of June 2, is it not?

A. Yes, sir; it is.

Mr. REILLY.—We object to any attempt being made to establish anything as binding upon Mr. Peake from entries made after he had sold his stock and had no more connection [132—57] with the corporation.

COURT.—I will hear the testimony.

Q. Now, just answer the question. Go right ahead; tell us whether the entries are made in this



(Testimony of C. L. Boss.)

book. If so, where? Refer to them, and explain them, please. What page are they on?

A. This entry was made in June to cover the distribution which was made in cash to Mr. Peake to account for the check that was issued at that time; and it says, Mr. Peake's capital account.

Mr. REILLY.—What page? A. 120.

Mr. REILLY.—Combined cash and journal?

A. Yes, sir. And it says his salary and his chair and desk, and it says the net earnings from November 25th to May 31st, during that entire period, in the bookkeeper's handwriting, made at that time; and this salary account is in the balance; this salary account is in the balance of May 31st.

COURT.—Let me see that.

A. Mr. Peake's capital account; salary account; little chair here, and the desk; and his net earnings, November 25th to May 31st, to cover the check of \$26.137.

COURT.—To cover the check?

A. Well, of distribution which was made June first.

COURT.—Well, did C. L. Boss & Company deliver to him a check?

Mr. SMITH.—Yes, I was just going to ask that, if the Court please. This calls for twenty-six thousand some odd dollars. [133—58]

A. The Judge wants one thing before that; this is in the balance of May 31st.

Q. First, that the salary was in the balance?

A. Yes, the salary was in the balance, before it



(Testimony of C. L. Boss.)

was ruled off, as of this date. Here is June 2d, in the book, and it is in the balance of May 31st.

Q. To what page are you referring now; what page of what book?

A. This is loose-leaf ledger, E. W. A. Peake's personal account that salary was in.

Q. Now, let's take up the next question that the Court asked: Whether there was a check given for this \$26,000? A. Yes, sir.

Q. Have you it with you? A. Yes, sir.

Q. Produce it, if you please.

COURT.—That didn't include the capital stock that you sold? A. Yes, sir.

COURT.—Which—the \$26,000?

A. Yes, sir; there was no capital stock ever sold. The capital stock was indorsed at my request as a means or a way. When we were down there, he made a proposition of dissolving and distributing either in cash or kind, and his proposition was accepted. And then when we went to the bank on June 1st, during banking hours, in order to perfect his own proposition in his own way, he took the physical assets of the corporation prior to this transaction, and took the notes on them, title notes, sold them to a copartnership, it was understood, and gave his check of \$9,600. [134—59]

Mr. SMITH.—We now ask for that check, if the Court please.

Mr. MAGUIRE.—It is there.

COURT.—When that was done, then he surrendered his capital stock, did he? A. Yes, sir.

Mr. LOGAN.—For what purpose did he surrender it?

Mr. REILLY.—Objected to. This man cannot say what somebody else's purpose in doing a certain thing was.

COURT.—You just tell the fact.

Mr. LOGAN.—What was the understanding between them?

Q. Where did you get your stock from?

Mr. LOGAN.—What was the purpose?

Mr. REILLY.—That is the same objection. Fact is fact. The purpose of it is matter of argument, a matter of witness' conclusion. The purpose is a matter for your Honor to determine from the facts.

Mr. LOGAN.—We desire to show that on the very next day Mr. Peake knew that the corporation was dissolved; knew that it was to be dissolved and that the transfer of the stock was in order to give them the majority of the stock, because Mr. Boss could not dissolve that corporation without a majority under the law. And the very next day Mr. Peake dealt with the partnership, as we will show you in a moment. He gave a check to Boss & Peake Automobile Company—

COURT.—You are getting away from the question I asked. It has been stated here that Mr. Peake sold his capital stock and disposed of it so that it went into the hands of Mr. Boss. Now, what I was getting at was, What was paid Mr. Peake for his capital stock? [135—60]

Mr. SMITH.—All right; \$15,000.

(Testimony of C. L. Boss.)

Mr. MAGUIRE.—Just a moment. Let the witness answer.

COURT.—I understood the \$15,000 was to reimburse Mr. Peake for money that he had advanced to the institution.

A. No, no. No, not at all.

COURT.—That is what I want straightened out.

Q. Let's get that clear, Mr. Boss, as to what you say Mr. Peake's proposition was. What items did it involve, in what amounts? First, the salary—what was that?

A. It was credited on the books at \$175 a month from the time the corporation started up until June 1st. It hadn't been authorized or hadn't been drawn.

Q. Do you know what that amounts to?

A. The balance was \$1,079; but he had had some gasoline charges, minor charges on his account, that made the balance \$1,079. I didn't figure it out, whether \$175 a month equaled just that; but the deal was that "I must have my salary."

COURT.—Mr. Peake?

A. Yes. "I must have the capital, and I must have my net earnings."

Q. In what sum was the capital fixed and why? He said, "I must have the capital." How much was the capital?

A. That capital was the amount of money he originally put in to the business in taking up his half interest of the stock.

Q. \$15,000?      A. \$15,000.

(Testimony of C. L. Boss.)

Mr. REILLY.—Par value of 150 shares of stock?

A. Yes. [136—61]

Q. And you have explained how you got at the estimated net profits? A. Yes.

Q. The total was \$26,137.15, was it? A. No.

Q. What else was included in that, if anything? You gave that before. What about the desk and the chair?

A. That belonged to Mr. Peake personally.

Q. And referring to this combined Cash and Journal, the entry to which I directed your attention at page 120 a while ago, can you tell what was the total amount that was agreed upon as being the sum in cash to be paid to Mr. Peake?

A. \$26,137.15.

Q. Was that paid to Mr. Peake? A. Yes, sir.

Q. In what way? A. By cash, by check.

Q. Is this the check that paid him?

A. Yes, sir.

Mr. SMITH.—We will offer the check in evidence, if the Court please.

No objection.

(Marked Boss' Exhibit "A.")

Q. The check is dated June 1, 1917, on the First National Bank, Portland: "Pay to E. W. A. Peake or order." Signed "Charles L. Boss." Endorsed, "E. W. A. Peake," and marked "Paid."

Mr. SMITH.—You admit, Mr. Reilly, that is Mr. Peake's indorsement on this \$26,000 check? [137—62]

Mr. REILLY.—I admit it.

(Testimony of C. L. Boss.)

Q. Now, prior to or at the time that Mr. Peake told you on what terms he would dissolve and quit, did you talk with him or tell him how you intended to go on with the business?

A. Yes. He inquired a number of times, which was brought about by the fact that he had Mr. McRell at luncheon.

Q. Did you discuss the formation of a partnership between you and McRell? A. Yes.

Q. With Mr. Peake? A. Yes.

Q. Were those plans then on foot for a partnership between you and McRell? A. Yes, sir.

Q. Did you form a partnership? A. Yes.

Q. Under what name?

A. C. L. Boss Automobile Company.

Q. Is that the present concern? A. Yes.

Q. When did you form that partnership?

A. June 1, 1917.

Q. Did you sign articles?

A. We left the bank and went right over into Mr. Logan's office and signed the articles on June 1, 1917, declaring our intention.

Q. Are these the articles?

Mr. LOGAN.—Those are not the articles; that is an assumed name.

A. Yes.

Q. It is an affidavit of assumed name, showing assumption [138—63] of the name C. L. Boss Automobile Company, by Mr. Boss and Mr. McRell?

A. Yes.



(Testimony of C. L. Boss.)

Q. Let me have the check, please, that Mr. Peake gave; \$9,600 check I have been asking for.

Mr. SMITH.—We are offering this document, Mr. Reilly, together with indorsement, showing its due recording in the records of Multnomah County.

(Marked Boss' Exhibit "B.")

Q. Now, on this same day of June 1st, 1917, what transaction, if any, did you have with Mr. Peake about a \$9,600 advance from him to C. L. Boss Automobile Company?

A. In following out this offer and the acceptance of the offer to dissolve and distribute, he took all the new Hudson automobiles.

Q. How many in number?

A. Eight; and took title notes on them; and took the warehouse receipts showing possession on them, and sold them back to the new copartnership, C. L. Boss Automobile Company, and put up the money so that that could be used to complete the distribution and dissolution of all the physical assets at that time in either cash or kind. Here is one of these title notes, showing the warehouse it was in, signed by the C. L. Boss Automobile Company, the very property of the corporation before the distribution took place. Those eight notes, together with \$8,000 in cash that I borrowed on real estate that I owned, together with some of the cash that was in the treasury of the Boss & Peake Automobile Company, amounted to the \$26,137.15 given to Mr. Peake after he had sold us the automobiles. We took that money and gave it back to him [139—64] and as

(Testimony of C. L. Boss.)

the new copartnership didn't have a banking account it was run through my personal account at the bank so that we could have the distribution of all the physical assets complete at that time. And then following that time I walked right over to Mr. Logan's office with Mr. McRell and signed that statement of the C. L. Boss Automobile Company under assumed name at that very minute.

Q. Now, you stated what Mr. Peake took in this dissolution and distribution. What became of the balance of the assets of the Boss & Peake Automobile Company? Who got that?

A. The division would go to me; and I would have the liabilities and the assets of what was left after he had his capital, his net profits, and his salary. I would have mine in the stock and the accounts and the liabilities.

Q. What do you mean, stock in trade?

A. In merchandise.

Q. Yes, merchandise. I call your attention now to a check.

Mr. REILLY.—Aren't you going to put these documents in evidence he has been referring to?

Mr. LOGAN.—I called attention to that a few minutes ago.

Q. I call your attention now to a check dated Portland, Oregon, June 1, 1917, on the First National Bank, of Portland, Oregon. "Pay to C. L. Boss Automobile Company, or order, \$9,600." Signed, "E. W. A. Peake." Indorsed, "C. L. Boss

(Testimony of C. L. Boss.)

Automobile Company, Charles L. Boss." Marked "Paid."

A. This is the \$9,600 that he advanced the new copartnership; put into the hands, put enough money to dissolve the corporation in cash or kind; put into the hands of the new copartnership before we had signed that statement; acknowledged [140—65] us as a going concern, and here—

Mr. REILLY.—Object to this argument.

COURT.—That is not testimony. It is only conclusion.

Q. In whose handwriting is this \$9,600 check?

A. Mr. Peake's.

Q. What signature is there here, the drawer of the check? A. Mr. Peake.

Q. At that time had you had any conversation with him wherein you told him that McRell was going in with you? A. Yes, sir.

Q. And the name under which you were going to do business? A. Yes, sir.

Q. Following the receipt of that \$9,600 check from Mr. Peake, what did you do with that check? Where did you deposit it, and to whose credit?

A. On June 1st I indorsed it C. L. Boss Automobile Company, then C. L. Boss, deposited on this slip—the vice-president of the bank states here it is the original slip—together with \$8,000 of money that I borrowed on my property, together with \$8,500—

COURT.—Never mind going into that. He simply asked what you did with that check.

(Testimony of C. L. Boss.)

A. Deposited that day in the bank.

Q. In whose name?

A. Name of Charles L. Boss.

Q. Yes. Is this the deposit slip? A. Yes, sir.

Q. Referring to this item— A. Yes, sir.

Q. You spoke of an \$8,000 item on this deposit slip. Have you any check showing where that came from?

A. From money borrowed of the Western Bond & Mortgage Company [141—66] personally.

Q. By yourself? A. Yes.

Q. Where did the \$8,537.15 on this deposit slip come from?

A. Out of the treasury of the Boss & Peake Automobile Company.

Mr. SMITH.—We now offer these three documents in evidence as one.

Mr. REILLY.—If they are going to offer these three documents in evidence as one, we would like to have the check from Boss & Peake Automobile Company to Charles L. Boss for that balance.

A. It was not to Charles L. Boss.

Mr. REILLY.—Well, whatever it was, let's have that check. They are offering this as one transaction, leaving out the most important part of it, the only part that counts.

Q. Have you a check from Boss & Peake Automobile Company to yourself of \$8,537.15?

A. I presume I can find it.

Mr. SMITH.—We will have to search for it, then, and produce it. They want to see it. We will attach it to this as part of the same exhibit.



(Testimony of C. L. Boss.)

Mr. REILLY.—We have no objection, with that statement.

COURT.—Very well. Let it be so marked.

(Marked Boss' Exhibit "C.")

Q. In your testimony you referred to some notes, sale notes, which also refer to warehouse receipts, etc., in which these automobiles were located. Are these two documents which I now hand you duplicates or originals of documents in that transaction?

A. This is an original, showing the warehouse—  
[142—67]

Q. This one in blue?

A. Yes; showing the warehouse it was in, and the warehouse receipt was attached to that. That was one of them. This was one of the automobiles that was up at the store on which there was no warehouse receipt attached to it, and that is why it was brought down.

Q. This was this yellow document? A. Yes.

Q. Those two are original documents? A. Yes.

Mr. SMITH.—We will offer them in evidence.

Mr. REILLY.—Objected to unless they produce them all. They are offering them as part of a transaction here, and they say there were eight notes, and they come in with two.

Mr. SMITH.—All right.

Q. Do you know where the others of these notes are?

A. No. One of them was put on the document that was turned over to the Government, and went on to Washington; and the others are old canceled



(Testimony of C. L. Boss.)

notes, and I could not find them in the record. I hunted for them. The records are on the books here.

Q. You stated you turned over to the Government this large mass of papers and documents?

A. Supplementary statements, final closing statements and memoranda.

Q. And none of them have ever been returned to you? A. No, sir.

Q. Have you searched for the remainder of these notes? A. Yes, sir.

Q. Where have you searched?

A. We changed bookkeepers twice. The bookkeeper—I kept [143—68] him busy for days trying to find all this old stuff.

Q. When did you make search for them, Mr. Boss, about when? A. Oh, it must be a year ago.

Q. Was it in connection with preparing this case that you made the search? A. Yes, sir.

Q. Have you been unable to find them?

A. We have not been able to find them anywhere. The three were all we were able to find—the one that went to the Government and these two here. The record is complete of them.

Mr. LOGAN.—I will state to your Honor, one of these notes is included in the photostatic copy introduced by the Government here.

Mr. MAGUIRE.—What is the number, Mr. Logan, in that photostatic reproduction?

Mr. LOGAN.—J-363.

Mr. MAGUIRE.—That is the only number given?

(Testimony of C. L. Boss.)

Mr. LOGAN.—Yes. \$1200.

Mr. MAGUIRE.—These two are also \$1200.

Mr. SMITH.—That is what he said that each of the eight notes was for, \$1200.

Mr. MAGUIRE.—That is what I say.

A. The record here gives the numbers of each car.

Mr. LOGAN.—It is admitted this is not the same note as either of the other two. This is a third one.

Mr. MAGUIRE.—That is a copy of one of the other notes.

COURT.—Do you object to those?

Mr. REILLY.—No, it is all right, your Honor.  
[144—69]

Mr. MAGUIRE.—They are accounted for.

Mr. SMITH.—We offer these two in evidence, if your Honor please.

(Marked Boss' Exhibit "D.")

Q. Referring now to your combined cash and journal, Mr. Boss. Are there any entries in that book which refer to or record the eight automobiles to which you have referred in the transaction with Mr. Peake? A. Yes, sir.

Q. Where is that record—on what page, please?

A. On page 120.

Mr. SMITH.—We will offer the record in evidence, for the purpose of completing his testimony on that subject, and showing the eight automobiles that were taken by Mr. Peake.

COURT.—What is the effect of the record?

Mr. SMITH.—Just read. I will have him read,

(Testimony of C. L. Boss.)

if the court please, the eight entries. They are very short.

A. Charged into Bills Payable, J-636—

Q. Meaning Journal?

A. Journal; combined journal and cash book.

Q. Read what the entries are, please.

A. \$1200, and there is one without a number, \$1200; then J-378, \$1200.

COURT.—You need not go further.

Q. Now, can you take this combined cash and journal and refer to that J-636, and show us what automobile it was that he got? Show us the number of the automobile or the record?

A. That is the number; that is the factory number. [145—70]

Mr. SMITH.—As far as we are concerned, we are offering all the books and records in our possession, and are referring to them. We are referring particularly now to page 120 of combined cash and journal, month of June, 1917, at which these entries occur.

Q. After this transaction with Mr. Peake and after June 1, 1917, who conducted the automobile business theretofore run by the Boss & Peake Automobile Corporation?

A. C. L. Boss Automobile Company.

Q. Has the Boss & Peake Automobile corporation been in business since June 1, 1917?

A. No, sir; not since May 31, 1917.

Q. Now, in relation to this income tax in question, Mr. Boss: Were you present with or were you

(Testimony of C. L. Boss.)

around about your business while the Government agents were investigating to see what tax you would have to pay?

A. Why, I just turned the room over to them, and the books over to them, and I never saw them unless they asked some questions.

Q. They worked that out at your place of business, did they? A. In a private room.

Q. What records did they have access to in getting at it?

A. All the records of our institution; and the bookkeeper was instructed if they wanted anything to be at their beck and call.

Q. Do you remember at what amount the excess profits tax was fixed for the period in controversy? How much excess? A. \$12,405.30.

Q. Did you pay any part of that? [146—71]

A. Just as soon as I was advised as to what it was, I went down there and paid, as I understood I was a stockholder, as I understood I was responsible as a stockholder for my proportion of the stock I held at the time the business was a going concern.

Q. What is this document I now hand you?

A. This is the check showing my payment.

Q. To whom was it made? A. To Milton A. Miller.

COURT.—What is the date of that check?

A. August 19, 1920.

Q. And the amount of it, please? A. \$6202.65.

Mr. SMITH.—We offer the check in evidence.



(Testimony of C. L. Boss.)

(Marked Boss' Exhibit "E.")

Q. Now, after this transaction, Mr. Boss, the transaction with Mr. Peake, and after the C. L. Boss Automobile Company took up the business on June 1st, about how long was it until the Boss & Peake Automobile Company actually dissolved? What did you do to dissolve the corporation, and when?

A. We went down to Mr. Logan's office, and left the technical matter entirely in his hands. And before we left there, he said, "Sign this statement," which was our statement of copartnership, before we left the office. Then he was very busy, and he said to us that he would prepare the papers—there was no particular hurry about it, but in plenty of time he would look after the detail work, the technical work that is required by the State statutory law.

Mr. SMITH.—Is there any question about the date of the actual dissolution, gentlemen?

Mr. REILLY.—The minute-books show the proceedings. [147—72] They are the best evidence of what happened.

Q. You don't in any way question the amount of this tax due the Government, do you, Mr. Boss?

A. No, sir.

Cross-examination.

(Questions by Mr. REILLY.)

Mr. Boss, at the time the Boss & Peake Automobile Company was organized and bought the assets of the C. L. Boss Company, the partnership



(Testimony of C. L. Boss.)

that was in existence at that time, that partnership was insolvent, or practically so, was it not?

Mr. SMITH.—Objected to as wholly immaterial, incompetent, and irrelevant in this case. This is the old partnership that went out of business in November, 1916, and its financial condition is not before this court.

Mr. REILLY.—It is very important.

COURT.—Well, the corporation took over the business of that concern?

Mr. SMITH.—Not all, if the Court please, under the testimony of the witness.

COURT.—The testimony may be relevant to determine what property came into the hands of the Boss & Peake Automobile Company.

Mr. REILLY.—It is very relevant, your Honor, upon this testimony of the witness that when they entered into their corporation, when they organized the corporation, that they had some sort of an agreement that when they dissolved that they would do otherwise than dissolve on each person taking half of the assets. In other words, a [148—73] fictitious value has been placed by the witness upon the goodwill of the business of the C. L. Boss Company, and he is using that as a means of explaining why Mr. Peake didn't get even one-half of his so-called half of the real assets.

COURT.—You may proceed to inquire.

Q. (Question read.)

A. It was practically so.

(Testimony of C. L. Boss.)

Q. And it was at your solicitation that the corporation was formed by yourself and Mr. Peake?

A. While it was at my solicitation, the first solicitation came from Mr. Peake in offering us money for brokerage purposes; and not only did he do that, but he many times came into the books of the C. L. Boss Company, and saw what the profit was on the Hudson Super Six automobile, time and time again.

Q. Just a moment, Mr. Boss. Try to confine yourself to my questions, if you can.

Mr. LOGAN.—He is explaining whose solicitation it was.

Mr. REILLY.—He is making his usual argument.

COURT.—He made the answer to that before. It is taking up a good deal of time with very many details.

Q. Then do I understand you to testify that when the corporation was formed, when you subscribed for your stock, started your corporation, that you at the beginning of things began to plan what you would do at dissolution? Is that what you testify to?

Mr. SMITH.—Object to the form of the question. He may state the fact.

(Objection overruled.)

COURT.—Go ahead and answer the question.  
[149—74]

A. In entering into the preliminary negotiation the matter was taken up under what condition we would conduct business between ourselves.

Q. That does not answer the question, Mr. Boss.

(Testimony of C. L. Boss.)

Do I understand you to say that in organizing this corporation you made your plans concerning dissolution of it? Is that a fact or not?

A. No; it could not be a fact. We made plans between ourselves.

Q. Did you make plans when you were forming the corporation as to what you were to do when the corporation was dissolved, if ever?

A. If we decided that we wanted to dissolve, it was decided that we would at no time take on obligations that we could not dissolve and cease to do business whenever we so elected; that is, we would not contract in such a way that would keep us continuously obliged.

Q. In other words, then, as I understand this agreement, it was that you would not get yourselves so far in debt that you could not liquidate?

A. The debt was not taken into consideration at all. It was running obligations that would tie us together an indefinite length of time.

Q. And that is all. There was not any other understanding between you as to what you would do when dissolution time came around? There was no other understanding between you at the time you formed this corporation as to anything concerning dissolution? A. Yes, there was.

Q. What was it?

A. That when we could not get along we would dissolve and cease to do business with each other. It was a very cautious preliminary proposition on account of Mr. Peake wanting to [150—75] hold

(Testimony of C. L. Boss.)

himself in such a position that he would not be held for debts or liabilities beyond a season, and at the time that we had our negotiations he never wanted any obligations that would carry over from one season to another.

Q. That does not quite answer the question. Was there any other arrangement or any other understanding or any other agreement as to what should become of any part of the assets of the corporation at dissolution? Was any such preliminary agreement made when you formed the corporation? A. No, sir.

Q. None whatever? A. No, sir.

Q. Now, after the corporation was formed, it started from the jump to make money, didn't it?

A. It made \$472 from November to January.

Q. Where did you get those figures?

A. The report that Mr. Peake filed with the Treasury Department.

Q. Wasn't it \$604?

A. With Mr. Weldy. Well, possibly I am mistaken. But if I remember it was \$472. I will admit that I might be corrected in that.

Q. From that time on the business was making lots of money?

A. The business made money from the time the Super Six contract came in, the automobile business did.

Q. When did the Super Six contract come in?

A. In the hands of the C. L. Boss Automobile Company.



(Testimony of C. L. Boss.)

Q. I am not talking about what happened after the corporation ceased doing business. The corporation made money all of its existence, didn't it?

A. Yes, sir.

Q. And made good money?

A. Yes, sir. [151—76]

Q. And was a live, going concern?

A. Yes, sir.

Q. And had an agency which was in all probability good for many years?

A. No. Agencies are subject to recontract every year.

Q. Yes; but nevertheless these agencies continue as a rule in the same hands, if the business is properly handled, don't they?

A. No. Covey lost the Dodge, and he couldn't help it.

Q. How long have you been handling the Hudson Super Six, the Hudson agency?

A. Ever since 1913; staging it first as a copartnership, then as a corporation, and like a play in another opera-house, under copartnership again, after the dissolution of the Boss & Peake Automobile Company.

Q. What about the play in the opera-house?

A. Just the same, in the same place.

Q. So that all this amounts to, then, is that you have been doing business here all this time in the same stand carrying on the same business, except that for a time Mr. Peake had an interest in the corporation? Is that what you mean?



(Testimony of C. L. Boss.)

A. No, sir.

Q. That is what you mean?

A. No, sir. We had Reo trucks one time, the Maxwell automobile one time, Maxwell and Chalmers at one time, along with the Hudson cars. It wasn't the same business, by any means.

Q. Now, state if the reason or one of the reasons that the corporation started making money wasn't that Mr. Peake arranged the financing of the company in such a way that it was not necessary for you to discount the paper you received from your purchasers.

A. That was immaterial compared with the benefit derived from [152—77] the predominant place that the Hudson automobile had. And on the Hudson we made money before the corporation was formed just as much as we did afterward.

Q. That didn't make any difference in your profits, the fact that Mr. Peake was able to get your paper negotiated without discounting it?

A. Practically little or no difference before or afterwards.

Q. Now, Mr. Boss, a moment ago—I was just looking for this—a moment ago you stated that at the time the corporation was organized there was no agreement concerning the manner of dissolution or the division of the assets of the corporation when it was dissolved.

A. How is that now? Please say that again.

Q. I say, a moment ago you testified that at the time the corporation was organized there was no

(Testimony of C. L. Boss.)

agreement of any kind relating to the division of the assets of the corporation, if and when it was dissolved? A. Oh, yes, there was.

Q. Didn't you so testify just a moment ago?

A. Any time that we wanted to cease to do business that we would be under no obligation that would bind us for the future.

Q. And there was no other agreement of any kind?

A. There was an agreement that I was to have a salary.

Q. Yes, and that he was to have.

A. And that was never entered up.

Q. What?

A. And that was never authorized in our minutes.

Q. All right. I don't care anything about that. There was no other agreement concerning the division of the assets? [153—78]

A. You mean a separate division of the assets? It was not specified how we would divide the assets at all.

Q. Was there any agreement concerning any division of the assets of the corporation made when the corporation was organized?

A. We had a verbal agreement between Mr. Peake and myself, under certain conditions and certain things. Nothing in our minutes here at all.

Q. I don't care anything about your minutes.

A. Ask me right out what you want, so I can get your question.

(Testimony of C. L. Boss.)

Q. I am giving you the question squarely; did you make any arrangement or agreement with Mr. Peake concerning the division of the assets of the corporation? Did you at the time that you organized the corporation make any agreement as to how any of the assets of the corporation were to be divided when the corporation was dissolved?

A. Yes, how they were going to be divided, but not as to the division of any assets.

Q. Well, what do you mean by how they were to be divided?

A. It was this: when he purchased the live assets of the C. L. Boss Company, he would pay no premium; that it would be at the cost. If at the time we dissolved and distributed our assets, if they fell to me I was to pay no premium for the assets, the like assets of what organization or what corporation we had at the time.

COURT.—What do you mean by premium?

A. Well, now, then, the goodwill of the C. L. Boss Company was not taken into consideration.

COURT.—Is that alleged goodwill there?

A. Yes.

COURT.—Very well. Go ahead. [154—79]

A. And the merchandise would be put in at what it cost.

Q. Well, now, what was the goodwill of the C. L. Boss Company, a bankrupt partnership, worth?

A. That was not bankrupt. It was insolvent.

(Testimony of C. L. Boss.)

It had nothing of any particular value, but it was not bankrupt. It had always met its obligations up to that time, and has since.

Q. Well, the insolvent partnership, what was its goodwill worth?

A. It was worth the contract with the Hudson, which was the very thing and the only thing of any particular value outside of the merchandise and assets.

Q. Well, how much was the Hudson contract worth? A. What was it worth?

Q. How much was the Hudson contract worth?

A. Nothing unless a man would equal the factory requirements; a good deal if the man was of ability to equal the factory requirements.

Q. How much was it worth to the C. L. Boss & Company partnership?

A. No more than it was worth to the Boss & Peake Automobile Company.

Q. I don't care anything about that. How much was it worth to C. L. Boss & Company?

A. Well, that is a question, I cannot say right offhand.

Q. How much was it worth to the corporation, then?

A. I would state that that is something a man cannot state, what it is worth. It is simply a right of franchise to do business during a limited period; and if you are not equal to the occasion during that period, you cannot have it for the [155—80] next season's business.



(Testimony of C. L. Boss.)

Q. Is it worth anything?

A. For a man who is equal to the occasion it is worth considerable. For a man that is not equal to the occasion, it is not worth anything.

Q. How much is it worth to a man who is equal to the occasion?

A. It depends altogether on a man's ability. It is like selling a man's liability in business right over again.

Q. You know something about your own ability, do you?

A. Yes. I made some money when I was in real estate.

Q. You know something about Mr. Peake's ability? A. Yes.

Q. You know what salesmen you had?

A. Same men that we had in the company beforehand.

Q. All right. Then how much was it worth to a man of your ability, with the salesmen you had when the partnership owned it, the partnership of C. L. Boss & Company?

A. That is a hard question to determine.

Q. Well, nevertheless, determine it.

A. I would not give a cent for it to bargain it, because the factory would not allow it to be bargained; could not bargain it at all. It is only the factory that reserve that right to themselves. That is where they have the right to dicker.

Q. That is not the question I asked you, Mr. Boss. How much was it worth?



(Testimony of C. L. Boss.)

A. It hasn't got one cent's commercial value.

Q. It hasn't got one cent's commercial value?

A. No, sir; because you cannot commercialize it. You cannot [156—81] even transfer it.

Q. The agency is of no value to the business?

A. I couldn't say that.

Q. Well, what was the value to the business? That is what I am trying to get at.

A. No commercial value.

Q. What kind of value? Did it have any value of any kind, commercial or otherwise, to the partnership of C. L. Boss & Company?

A. Not that the company or the partnership had in itself as an entirety. That belongs to the factory.

Q. Well, then, as I understand you, the agency for the Hudson Super Six—the Hudson cars generally? A. Yes.

Q. That the partnership of C. L. Boss & Company had was worth nothing to the partnership?

A. No, I didn't say that. I said it was a valuable agency in case the party having it was equal to the occasion. It had no commercial value.

COURT.—That is, was able to handle it.

A. Yes.

Q. All right. Was the partnership able to handle it? A. Yes, sir.

Q. All right. Then what was it worth to the partnership? You say it was a valuable asset to it. Now, how much was it worth?

(Testimony of C. L. Boss.)

A. It has an undetermined value, according to the ability of the man.

Q. Worth \$25,000? [157—82]

A. No, it was not worth any commercial value at all. It is just like selling a man's ability back to him. What is your ability as an attorney? Can you sell your ability as an attorney? Can you transfer your ability to somebody else? You cannot transfer the essence of value in a contract to anybody else.

COURT.—Let me inquire what the point of this is.

Mr. REILLY.—The point of it is this: this agency was an asset of such a value that, if there was any dissolution of the corporation, it must have been taken into account, and Mr. Peake, in the dissolution, would have got at least \$25,000 in excess of the sum he got if this was a dissolution. That is the purpose of it, your Honor, and that is one reason why I am having so much trouble with the witness.

Mr. LOGAN.—The same argument would apply to a sale of stock.

A. The new Dodge concern didn't pay one cent.

Q. We don't care about the Dodge.

A. Nobody pays anything for that.

Q. Will you, or will you not, place a value upon the Hudson agency and the other agencies which the partnership of C. L. Boss & Company had at the time it sold out to the Boss & Peake Automobile Company.

(Testimony of C. L. Boss.)

Mr. LOGAN.—We submit, your Honor, that he has answered that by saying certain things.

COURT.—It is not clear to the Court yet that he has answered it.

Mr. REILLY.—I can't find an answer.

COURT.—Go ahead.

A. The value is in the value of the man, the ability of the [158—83] man to conduct a successful business.

COURT.—Well, who is the man that conducts it? Wasn't it yourself? A. Yes, sir.

COURT.—Your ability was transferred from C. L. Boss & Company to the Boss & Peake Automobile Company, wasn't it? Isn't that the point?

A. Yes, sir.

COURT.—Well, now, then, answer the attorney's question what that was worth.

A. What my ability was worth?

COURT.—No. What the agency was worth.

A. Mr. Peake stated at the time he didn't think it was worth anything.

Q. Never mind what Mr. Peake stated.

COURT.—You answer the question if you can.

A. I cannot answer it, Judge. I cannot answer it. I don't see any ground for answering it.

COURT.—Did it have any value at all?

A. Not in itself.

COURT.—Well, you have been over that; but under the conditions that then existed, did it have any value?

(Testimony of C. L. Boss.)

A. No, if I had to go out of business, I took the same ability I had in real estate.

COURT.—You were carrying yourself over into the Boss & Peake Automobile Company? Your ability was to go along with that?

A. I was to get a salary for that.

COURT.—Now, what was this agency worth under those conditions?

A. Offset by the hazard that was going into the automobile [159—84] business.

COURT.—That does not answer the question. Go ahead with your examination.

Q. You can make no better answer, or will make no better answer to the value of the agency to the partnership than you have so far made?

A. I cannot set a commercial value on something that had no commercial value.

Q. That is good enough. What was the value of the agency to the corporation at the time Mr. Peake sold you his stock?

Mr. SMITH.—Objected to as assuming a state of facts not yet proven.

Q. Well, on the 31st day of May, 1917?

A. Value to the corporation? The corporation had ceased to exist, and they could not transfer it.

COURT.—He is talking about the agency of this car. What was the value to the corporation that got it?

A. Why, they could not transfer it. It was not commercial. In fact, we had to be approved personally.



(Testimony of C. L. Boss.)

Q. How long did that contract have to run after May 31st, 1917?

A. November 1st—let me see—at that time December 1st. Wait a minute. I wouldn't say. I am not positive.

Q. Wasn't it January 1st of the following year?

A. No. They never date their fiscal year at January. It was either September 1st, or October 1st, or November 1st.

Q. And it had been the practice and is generally the practice for automobile companies to make their contracts for one year at a time? [160—85]

A. Yes, sir.

Q. Renewing them if they are satisfied with the people they are doing business with?

A. Yes, sir.

Q. At the end of each year? A. Yes, sir.

Q. And this agency had at least May, June, July and August to run? A. No, May 31st.

Q. June, July and August to run, at least?

A. Yes.

Q. Assuming that it terminated September 1st, the earliest date you have given us? A. Yes.

Q. And that was, in your judgment, of no value to the corporation? A. No commercial value.

Q. Now, what other agencies did the corporation have? A. Maxwell Motor Sales Corporation.

Q. What? A. The Maxwell agency.

Q. How long did the Maxwell agency have to run? A. One month.

Q. Terminating July 1st? A. Yes.



(Testimony of C. L. Boss.)

Q. And the custom of the Maxwell people was to make their contracts from year to year, renewing if they were satisfied with the agents?

A. Yes, sir.

Q. How much, if any, was the value of this Maxwell agency on May 31, 1917?

A. No commercial value, because they were writing the new contracts right at that time. They always write them 30 days [161—86] in advance, and then if the agency was not satisfactory, there was nothing there.

Q. Had they written a new contract for the corporation at the time of this sale of the stock?

A. No, no, sir.

Q. How soon after the 31st of May was it that a new contract was made with the Maxwell people?

A. Early in June.

Q. Do you know how early?

A. No, sir. It is customary, however, for us to sign the contract 30 days in advance of expiration.

Q. Well, that would be the 31st of May.

A. It would be either that or around the first of June.

Q. So that, at the time of this transaction, you were almost in the act of signing up a new Maxwell agency?

A. Yes, that was it. I doubt if any goods—

Q. You place no value upon that agency?

A. No commercial value.

Q. How long did your lease of the property or premises up there have to run?

(Testimony of C. L. Boss.)

A. The lease was in my name. It never was in the Boss & Peake Automobile Company's name at any time.

Q. How long did the lease have to run?

A. I had a lease on the building for three years.

Q. For three years following May 31st, 1917?

A. No, it had about two years and several months to run.

Q. Two years and several months to run?

A. Yes.

Q. Did you take the lease of the building in your own name during the existence of the corporation? [162—87]

A. No. Mr. Peake forced me to take it in my name, and had a clause put in it that it could be assigned over to the corporation; and he would never allow me to sign it over—never assumed the liability under the lease, that remained in my name during the time of business.

Q. Did the corporation pay the rent?

A. The corporation paid the rent; yes, sir.

Q. And that had two years and some months to run? A. Yes.

Q. Do you place any value on that to the corporation?

A. No. We paid as much rent for it then within seventy-eight dollars as we do to-day.

Q. When was it that this first conversation took place concerning Mr. Peake getting out of the corporation, without specifying the form that transaction took? When was it first discussed?

(Testimony of C. L. Boss.)

A. After Mr. Peake took Mr. McRell to dinner in March and Mr. McRell reported to me that Mr. Peake had made overtures.

Q. I am not talking about that. I am talking about conversations between you and Mr. Peake concerning Mr. Peake selling out to you.

A. Either in February or March.

Q. Between you and Mr. Peake.

A. When we first talked about quitting our business relations.

Q. When was the first discussion between you and Mr. Peake concerning Mr. Peake selling out to you, by which you got down and discussed concrete propositions, or considered the question of his selling out?

A. On May 21st, 1917, at the depot, he made his first proposition for dissolution. In March of 1917, after a conversation, [163—88] he made an offer to sell out.

Q. What do you mean by an offer to sell out?

A. He made an offer to sell his stock in March of 1917, and that offer at the time I accepted, and went down into Mr. Logan's office and stated to Mr. Logan to draw up the paper, and Mr. Logan drew up the paper, and I went up there and gave it to Mr. Peake, and then he didn't want to do it. That is the only time he offered to sell his stock. The other time was to cease to do business, closing up our relations together.

Q. This conversation, you say, in March, was one by which he offered to sell you his stock.

(Testimony of C. L. Boss.)

A. In March of 1917 he offered one day to sell his stock out to me, and the very offer at that time I made a memorandum of, and took it down into Mr. Logan's office and had him draw it up in writing, and brought the writing right back up to Mr. Peake, and gave it to him that very day, and then he would not come through on the deal.

Q. He refused to sign?

A. He refused to come through on the deal on the very offer that he made.

Q. Is this the agreement in March, the one that you tendered to Mr. Peake?

A. Yes, sir. That is the very deal.

Mr. REILLY.—We will offer it in evidence.

(Marked Peake's Exhibit "A.")

COURT.—What provision of that is important?

Mr. SMITH.—It is unsigned, isn't it, Mr. Reilly?

Mr. REILLY.—It is; but it is stated by the witness to have been drawn by his attorney and offered to Peake, and Peake refused to sign it. It becomes important because of [164—89] certain allegations in the complaint. I would rather not disclose the purpose now.

COURT.—Very well.

Mr. REILLY.—Do you waive the reading of it now?

Mr. SMITH.—No, sir.

Mr. REILLY.—Very well. (Reading:) "This agreement made and entered into this 26th day of March, 1917, by and between E. W. A. Peake, hereinafter called the vendor, of the one part"—



COURT.—What is the object of reading it now?

Mr. Smith to get the terms before the court firmly at this time that are in that document, March previous, because the witness has drawn a distinction between that and what was done finally.

COURT.—Well, read it then.

(Document read as follows:)

“THIS AGREEMENT made and entered into this 26th day of March 1917 by and between E. W. A. PEAKE hereinafter called the ‘vendor’ of the one part and C. L. BOSS hereinafter called the ‘purchaser’ of the other part.

WHEREAS, there was organized and incorporated on the — day of —, 1916, a domestic corporation with its principal office and place of business at Portland, Multnomah County, Oregon, officially known and designated as Boss & Peake Automobile Company with an automobile stock of \$30,000.00 divided into three hundred (300) shares of the par value of one hundred (\$100.00) dollars per share, and

WHEREAS, of the said three hundred shares of stock of said corporation there is now owned by said vendor 149 shares thereof in his own name and he is the assignee of one share of stock of said corporation heretofore issued to R. E. Murphy, making in all now owned and controlled by the said vendor 150 [165—90] shares of capital stock of said corporation, and

WHEREAS, the said vendor and the said purchaser have this day agreed upon an option for



sale herein given and made by the said vendor to the said purchaser upon the considerations and promises hereinafter expressed,

NOW, THEREFORE, this agreement for sale and option, WITNESSETH: That the said vendor E. W. A. Peake agrees upon July 1, 1917 next following to sell and deliver to the said purchaser C. L. Boss, at the office of Boss & Peake Automobile Company at Portland, Oregon, 150 shares of the capital stock of Boss & Peake Automobile Company for the consideration of One (\$1.00) Dollar to him in hand paid, the receipt whereof is hereby acknowledged, and upon the following terms, to wit:

That on July 1, 1917 there shall be taken and completed an inventory of the goods, wares and merchandise and open accounts then owned by Boss & Peake Automobile Company based upon cost of original purchase by the said corporation from C. L. Boss & Company and the purchase price of goods, wares and merchandise bought by said corporation since its incorporation, 50% of which inventory shall constitute the sale value of the said 150 shares of the corporate stock of the said Boss & Peake Automobile Company upon which this option is given; that the said purchaser shall pay or cause to be paid to the said vendor within three days after the completion of said inventory so found as above set out a sum of money in cash equal to 50% of such inventory.

It is further agreed that the said purchase shall be completed on or before the third day next suc-

(Testimony of C. L. Boss.)

ceeding the completion of the inventory which shall be commenced and finished as of the 1st day of July 1917 and said inventory shall be taken and completed with expedition and on payment of the said sum of money as hereinbefore set out, the said 150 shares of the capital stock of said corporation shall be at the same time duly transferred by the said vendor to the said purchaser.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written.

Witnesses:" [166—91]

Q. Mr. Peake refused to sell on those terms, did he not?

A. He refused to comply with his proposition to sell.

Q. He refused to sign this agreement?

A. Yes, sir.

Q. Now, before I forget to ask you, as I understand, you testify that in this sale by Mr. Peake to yourself, or whatever this transaction amounted to at the end of May, the reason you didn't get an even break in the end was that you assumed the liabilities of the corporation. Is that so?

A. No, I didn't say that. I said that he estimated that the net profit would be \$20,000, allowing over \$2000 to cover the guarantee on the notes, our endorsement, the service on the cars that were already out, the incidental bills that we could not keep on this momentary statement—we would go out and buy something; the bill hadn't

(Testimony of C. L. Boss.)

come in—we cannot keep it. His own statement was that while this supplementary statement showed over \$22,000 net profit, he estimated the net profit was \$20,000; and he said, “I must have my”—

Q. Just a moment. Those liabilities he was to be relieved from? A. Yes, sir.

Q. So that when he disposed of his stock to you, whatever you call the transaction, without wanting to commit yourself that it is a sale or what it is— A. Yes.

Q. When he indorsed his stock and handed it to you, he was to be clear of the corporation's debts? Is that right?

A. That was the part that I was to take, yes, the liabilities and the—

COURT.—You assumed the liabilities of the concern? Is that the fact? [167—92]

A. No, no. I assumed the liabilities on the notes of the concern. I assumed the overhead expense. I assumed the service on the cars. That is, that amount was set aside for, eliminated from the rest of the profit to take care of it. Now, then, that part I was to assume, and I was to assume the open accounts.

Q. Was there any agreement at that time, when the stock was transferred to you, that Mr. Peake was to assume or respond to any of the corporation's liabilities?

A. No, he was not to assume—respond to anything.

(Testimony of C. L. Boss.)

Q. And the agreement was, was it not, that in that transfer you were to take whatever liabilities there were?

A. Yes, that is right. I was to take the liabilities.

Mr. REILLY.—That is all.

Recess until 2 P. M.

Portland, Oregon, May 23, 1922, 2 P. M.

C. L. BOSS resumes the stand.

Cross-examination Continued.

Q. Have you brought into court the sheets—I see you have—showing the capital account of R. J. McRell and C. L. Boss? A. Yes.

Q. Have you the bill of sale from the Boss & Peake Automobile Company to the partnership?

A. Mr. Logan kept our technical papers.

Mr. LOGAN.—I have it.

Mr. REILLY.—Will you allow us to inspect it?

Q. You have testified that the corporation turned over eight automobiles to Mr. Peake and that Mr. Peake transferred them back to the C. L. Boss Automobile Company. Have you a copy—have you any bill of sale from the corporation to Mr. E. W. A. [168—93] Peake of those eight automobiles, or of anything else? A. No, sir.

Q. Have you produced the original stock certificates of the Boss & Peake Automobile Company with the stubs?

A. We haven't any stubs to my knowledge. All our papers were kept by Mr. Logan, and I don't



(Testimony of C. L. Boss.)

know of any stubs. If there were, I don't know of them now, and I don't know that there were.

Q. Did Mr. Logan keep the stock books of your corporation in his office? A. No, sir.

Q. They were kept in your place of business?

A. Well, I don't think so. I think at that time Mr. Peake kept them.

Q. After he turned the stock over to you?

A. Everything was taken down on June 1, 1917, and all turned over to Mr. Logan—left with him.

Q. Then you say that Mr. Logan has your stock books?

A. I don't know that there was a stock book. I don't remember ever seeing a stock book. The original stock is there.

Q. Has Mr. Logan the stubs which were originally affixed to those stock certificates?

A. I don't know that there were any stubs affixed to them.

Q. Have you your minute-books?

Mr. LOGAN.—I have them.

Q. Let me refresh your memory from your minute books as to whether there was a stub.

A. Yes, there is a stub attached to that.

Q. Well, isn't that stated to be the form of your stock?

A. Well, you might buy those sheets anywhere in the stationery [169—94] house.

Q. Now, then, were there, or were there not, stubs attached to your original stock certificates?



(Testimony of C. L. Boss.)

A. Not to my knowledge.

Q. Do you mean to say you don't know that there were stubs, similar to that shown in the book, attached to the stock certificate marked Exhibit "A" in your minutes?

A. No, I don't know that there was any stub there. I just thought that that was stationery stock that was purchased just for this occasion.

Q. Have you ever seen any of those stubs?

A. Why, I don't recall of ever seeing any. I don't recall anything about them.

Q. Did you ever hold any office in any other corporation than the Boss & Peake Automobile Company? A. No, sir.

Q. Are there among your papers these stubs of these stock certificates?

A. Not to my knowledge.

Q. Or anywhere in your books?

A. No, sir, not to my knowledge.

Q. Mr. Logan was your attorney in June, 1917?

A. Yes, sir. He has been my attorney for pretty near 17 years.

Q. He has been your attorney ever since June, 1917? A. Yes, sir.

Q. He was your attorney in the spring of 1920; he was your attorney at all times since this transaction in May, 1917?

A. Yes. But we have had other attorneys under some other conditions. But he has been our regular retained attorney. He [170—95] was my

(Testimony of C. L. Boss.)

attorney when the company was the C. L. Boss & Company, prior to the corporation.

Q. He was your attorney who was handling for you these income tax matters or these excess profits tax matters with the Federal Government?

A. No, I went down to the Federal office and got the information there. I didn't ask for any attorney to draw up the papers.

Q. You did consult with Mr. Logan during some part of this? A. Oh, in this business, yes.

Q. Concerning the tax which has been claimed by the Government? A. Yes.

Q. And he was your attorney in that matter and had some discussions on your behalf and aided you in writing letters and wrote some himself? Isn't that true?

A. Now, I don't know that he aided me in writing. He wrote some himself.

Q. And those were at your instance?

A. Oh, yes.

Q. And he was authorized to write them by you?

A. Yes, sir.

Q. And you informed him of the facts concerning the corporation and the partnership to enable him to write letters on the subject? A. Yes, sir.

Mr. SMITH.—Let the record show that we produced that, Mr. Reilly.

Mr. REILLY.—It is here. If you want the record to show you produced it in response to demand, very well.

Q. Is this the bill of sale from the Boss & Peake

(Testimony of C. L. Boss.)

Automobile Company to the C. L. Boss Automobile Company? [171—96]      A. Yes, sir.

Q. Is that your signature over the word president?      A. Yes, sir.

Q. Is that McRell's signature over the word secretary?      A. Yes.

Mr. REILLY.—We will offer this bill of sale in evidence.

COURT.—Is there any objection to that?

Mr. SMITH.—No objection, if your Honor please.

COURT.—Let it be marked.

(Marked Peake's Exhibit "B.")

Q. Now, you have stated, Mr. Boss, as I understand it, that you were not able to produce any of those what you have called in your answer and cross-complaint the satisfactorily estimated statements of the business.

A. Why, I turned them all over to Mr. Weldy and Mr. Butterfield.

Q. Now, did you turn over among those statements one which was made on or about the 31st day of May, 1917?

A. No, it was made about—it was made in the neighborhood of the 20th of May, or before that time.

Q. Did you turn that one over which was made on or about the 20th day of May, 1917? Did you turn that over to Mr. Weldy?

A. All those memorandums and final statements and everything, I had in a bunch and kept them all

(Testimony of C. L. Boss.)

together, and turned them all over to Mr. Butterfield and Mr. Weldy.

Q. Was that one of May 20th among the number that you turned over to Mr. Weldy?

A. I cannot say, but I had those satisfactory supplementary statements that were turned over, together with all final statements, and lots of memorandums I had, that I kept and kept [172—97] together.

Q. Did you turn over all of the satisfactorily estimated statements that were ever made down there in your business to Mr. Weldy?

A. Oh, no, no, no. Those were destroyed, a good many, as the time went by, and new ones came up.

Q. Did you turn over all the latest ones made during the life of the corporation to Mr. Weldy?

A. No, I had quite a number of supplementary statements and quite a number of memorandums, together with my final statements, that I turned over to Mr. Weldy.

Q. Well, did that include all of the latest so-called satisfactorily estimated statements?

A. I cannot tell you at this time. It is absolutely impossible for me to know what I turned over in the final detail of each one. But I had kept as my record all the memorandums and data and everything; had a big bunch of them.

Q. You had kept all of these satisfactorily estimated statements then, had you?

A. No, sir, I didn't keep all of them.



(Testimony of C. L. Boss.)

Q. Well, I mean, you didn't turn any of them over to Mr. Peake?

A. He had his when I had mine. He had copies.

Q. There were two of them? A. How?

Q. They were made out in pairs?

A. When Mr. Murphy would draw us off statements, almost invariably—not at all times—he would draw up one for Mr. Peake and one for myself.

Q. Then these statements, this statement on or about the 20th day of May you would say was in duplicate?

A. No, I didn't. It might have been. I didn't say it was in [173—98] duplicate. He might have made one statement. We both might have seen it. But as a rule Mr. Murphy would make a statement for Mr. Peake, and he would make a statement for me at the same time.

Q. At any event, you kept one statement made on or about May 20, 1917? A. Yes, sir.

Q. Is that true?

A. I kept a number of them.

Q. I am not talking about any others. I am asking about that one. Did you keep that one, or not?

A. Yes, sir. I have a supplementary satisfactory statement on or about that date.

Q. And you saw that after the time that the corporation had actually been finally dissolved? You have seen it since then?



(Testimony of C. L. Boss.)

A. I had all my papers, and kept them all, and turned them all over to Mr. Weldy.

Q. Answer my question. Did you see this so-called satisfactorily estimated statement of May 20th or thereabouts since the dissolution of this corporation?

A. Yes, I called their attention to them when I turned them over.

Q. You called Mr. Weldy's attention to that particular one?

A. No; all the memorandums.

Q. Well, I don't ask about any others now. I am asking you about this one. Confine yourself to this one. Did you or did you not call Mr. Weldy's attention to that so-called satisfactorily estimated statement of May 20th?

A. Not any one particular statement.

Q. Well, was that statement among the number that you called to Mr. Weldy's attention? [174—99]

A. I took my statements to him and called his attention to what I had. I cannot tell you whether that particular one I called his attention to.

Q. Was that one among the ones you called attention to? A. Yes.

Q. Why did you have your attorney serve demand upon us for it?

A. Because I had an idea that Mr. Peake had the same thing too.

Q. You had an idea there were two of them?

A. Why, Mr. Murphy almost invariably made

(Testimony of C. L. Boss.)

them in duplicate, and if Mr. Peake had kept his statement, why, he would have had the same thing that I had.

Mr. REILLY.—Will you waive the reading of that bill of sale at this time?

Mr. SMITH.—Yes, we waive it.

Q. Now, in making up these satisfactorily estimated statements, particularly that one made up around the end of the month of May, did you take into account pages 159-a and 159-b of your Journal?

A. You don't understand. That could not be. That was the total at the end of May. Now, we took into account the balances on the book on the accounts as we went along. Now, if we would make one out in the middle of the month, we would bring everything up to date as nearly as could be possible. It was not possible to have a statement at the middle of the month represent the exact true conditions without these little current bills.

Q. Well, is it your idea, then, that pages 159-a and 159-b of the journal were made at the end of May, 1917?

A. Yes. Yes, those are the balances of the accounts in the book; and from those balances and prior dates was drawn the [175—100] satisfactorily estimated statement.

Q. So it is your idea that these two pages were made on the last day of May or the first day of June?

A. No, the bookkeeper generally has momentary business, and he gets his balance when he can get

(Testimony of C. L. Boss.)

it. He may get his balance at the end of the month, and he may be delayed in getting it and do his work under the date that is in the book. Now, if a bookkeeper has people at the counter to wait on, business to wait on, he has to take care of that momentary business. Then he goes back to his book when he can get there, and the book balances are as of May 31, 1917.

Q. When do you think this sheet composing the two pages was made?

A. Just as soon as Mr. Murphy could get to the balance and make it.

Q. That doesn't tell us anything. When do you think it was made? A. Right after May 31st.

Q. How many days or hours or whatever you want to say?

A. In other words, for me to tell what date he got his balance off?

Q. If you know.

A. I don't know. He might have got it off that night; might have got it off next day.

Q. He might have got it off three weeks later?

A. Well, that is possible but not probable.

Q. So that you cannot use these sheets 159-a and 159-b in figuring out the statement of the business as you did in explaining it to the Court?

A. Yes, you can. You can use the balances on the book, and these are balances on the books of May 31st. Now if you want the [176—101] balance of May 20th, you have to take the record of May 20th. And there are some memorandums,

(Testimony of C. L. Boss.)

copies that would go into the balance of May 20th that you would not have those memorandums at this time. But you cannot go and talk about these balances at the end of the year and take those total amounts and talk about some prior time.

Q. What do these satisfactorily estimated statements look like? Were they on white paper?

A. Yes, sir.

Q. Or scratch paper? A. Oh, no.

Q. Ruled paper? A. Yes.

Q. Loose leaf, cut for loose leaf entries?

A. No, regular office paper, sometimes about as long as foolscap paper.

Q. Made with typewriter or pen?

A. Mr. Murphy would make them with his pen. He was an accountant.

Q. Were they in substance the same as 159-a and 159-b except for different times?

A. Oh, no.

Q. Entirely different?

A. You don't get the idea of it. The book there itemizes the business down to a detail of each time; and at the time that they wanted the statement, they would bring off the profit down to that date, take the expense account to that date, and then if in the middle of the month you had allowed for current overhead bills, if at the end of the month you got all of those bills in and paid for, you can have a more definite statement than you can in the middle of the month. [177—102]

Q. Now, as a matter of fact, Mr. Boss, what was



(Testimony of C. L. Boss.)

the value of the assets of the corporation on May 31st? Take whatever books you want, and tell us that. What book do you want?

A. I want all of them.

Q. All right.

A. Not counting the salaries, the books show a profit of \$52,746.64, of which \$2,746.64 was estimated current bills, service on automobiles, profit and loss on endorsements, the business liabilities of that present day, leaving the net profit after that statement of \$50,000—not net profit; net in the business.

COURT.—What are those figures you gave there? A. As profit?

COURT.—Yes. A. The profit was \$20,000.

COURT.—I know; but you gave figures there fifty thousand.

A. No, the amount in the business. As I understood, the amount in the business.

Mr. REILLY.—The assets in the business. He said profits, but he meant assets.

A. Yes, if I said profits I meant assets.

COURT.—What is that asset?

A. \$52,746.64, of which \$2,746.64 was current liabilities.

COURT.—Yes, I understood that.

Q. Your profit and loss account in your ledger shows a profit of \$22,746.64? Is that right?

A. Yes, sir.

Q. All right. Now, that profit was estimated, was figured, or [178—103] was placed on the books



(Testimony of C. L. Boss.)

after allowing for the deduction of the salaries of both you and Mr. Peake, was it not?

A. That is what I said, without counting salaries here when I made the statement.

Q. In other words, after the salaries were paid?

A. Yes, sir.

Q. And after Mr. Peake was paid for the desk and chair?     A. Yes.

Q. The profit shown on your books at that time was \$22,746.64?

A. Not taking into consideration the current bills, the service on the cars, the profit and loss on the notes that were indorsed that were out.

Q. Let me get at it in a different way, then. You assisted in making the final return to the Government on behalf of the corporation?

A. No.

Q. On the strength of which the \$12,000 tax was assessed?

A. No. I only signed it at the request of the Government's auditors. I never assisted in it at all.

Q. All right. You have admitted in your answer that the net profit of the corporation for that period, for the first five months of 1917 was the sum it is alleged in the complaint to be.

A. That I had no objection to it.

Q. You have admitted it to be that sum, have you not, and have already paid half of the tax on that basis?

(Testimony of C. L. Boss.)

A. The Government demanded it, and I thought it was right; paid it; believed it was just.

Q. You thought it was right?

A. Believed it was.

Q. Now, this figure which is left in the amended bill, this [179—104] allegation you have admitted to be true, and you still admit it, do you not, that the entire net—

A. I don't understand what the amended bill is. You will please explain.

Q. Well, it is the complaint, the amended complaint; the last one which was filed which you had to answer. It alleges the entire net income of the Boss & Peake Automobile Company, a corporation, received by it from all sources during the time from January 1, 1917, to June 1, 1917, subject to the payment of such tax imposed by the provisions of said Revenue Act of 1917, and the Revenue Act of 1916, was \$22,549.94. You admit that?

A. The books here show the income from the time the corporation started, and the Government report shows the income from January 1st to May 31st, and Mr. Weldy segregated the income from the time the corporation started until January 1st, and his findings I signed as a stockholder without question; paid my proportion without a question, believing it to be correct.

Q. His findings were that the profit during December was six hundred and four dollars and some cents. Is that right?

(Testimony of C. L. Boss.)

A. I am not sure as to that amount.

Q. And that during the first five months of 1917 the profits were twenty-two thousand five hundred odd dollars?

A. If Mr. Weldy—if those are his figures, why, I presume that they are right. I don't question it, because he found some items in here that were carried in the expense account; like furniture and fixtures, and he corrected these books. They were not under my supervision during the time of the corporation. [180—105]

Q. So that these bills payable, etc., these current bills payable, etc., that you are talking about, didn't have any effect to reduce your book profit?

A. Yes, it did. I will show it right here in these books that have been submitted.

Q. All right.

A. For a month, so that we could find out what they amounted to, the copartnership ran an account, and the reason they ran an account was Mr. McRell didn't know whether he could put in \$8000 or \$5000, and when he found out that he could not put in but \$5000 before the month was up, we agreed to absorb in the different current accounts this service, the profit and loss on the notes, and those things. Now here is an account here, showing it ran for a month; there is the \$597 of losses, expenses, liabilities carried over that was in the month; and we didn't run it for a month, and against that was set off some credits here.

Q. Amounting to how much?

(Testimony of C. L. Boss.)

A. \$159.18 and \$597. If that account had run, it would have absorbed more than \$2700, or at least that amount of money, because automobiles that had to be repossessed, and profit and loss account, accounts at a loss, and everything else would have eaten it up. Now, this includes such items as storage, insurance, many items of service on automobiles that were out, and commission paid to somebody. What are these items?

Q. This is June 8th, used car account.

A. That is cut out. It was a mistake.

Q. This one? A. Yes; commission.

Q. This B. D. Ball? [181—106]

A. There is a loss on that account. What is this?

Q. Insurance, cars.

A. Insurance out; those current items could not be gathered up by that stated period of the balance, and continued on, and the liability of them continued, and we ran that account a month to find out what the amount would be; then we didn't run it after that month, because we saw it would not only eat up that allowance for those different items, but in all probability amount to a little bit more than that.

Q. Now, let's see what became of this item which you show in your books here, profit of \$22,746.64, after the salaries were paid. Now, what became of that money, that \$22,746.64? Show me on the books.

A. That item divided and held in abeyance to



(Testimony of C. L. Boss.)

find out how much interest Mr. McRell would take in the business.

Q. Show me on the books, then we will have our explanation. What became of them on the books?

A. There it is right there.

Q. You are referring to profit and loss?

A. Yes, sir.

Q. Show me what became of the \$22,000.

A. I will show you on the books; let me find it first.

Q. Tell me first what this entry shows, the three of them that relate to the disposition of that money.

A. That shows the net amount, without those items in, of profit went to Mr. Peake.

Q. How much? A. \$10,000.

Q. How much to Mr. Boss? [182—107]

A. That shows that half of that amount was held in abeyance on my account for myself.

Q. Answer my question, Mr. Boss.

A. \$11,373.32.

Q. What does it say in front of that?

A. C. L. Boss.

Q. Now, then, what is the next item?

A. It says surplus, \$1373.32.

Q. Now, then, turn to C. L. Boss personal account. What is the date, first, of those items that I have just called to your attention on the profit and loss account?

A. May 31st, the first two, and June 1st the second.



(Testimony of C. L. Boss.)

Q. Now, then, turn to C. L. Boss' personal account. Now, where is June, 1917?

A. That don't go there; it goes in the stock account.

Q. Then let's turn to the surplus account.

A. The stock account. That is the stock account on the current ledger there.

Q. Then it was not transferred to the personal account of C. L. Boss at that time?

A. Yes. The personal account of May 31st; profit and loss credit; that leaf right there.

Q. Was it transferred to C. L. Boss' personal account? A. Yes.

Q. Well, show it to me.

Mr. SMITH.—What is it you are asking for?

A. Personal capital account.

Mr. MAGUIRE.—No, we are not asking for that at all. It is a personal account right there in that book.

Mr. REILLY.—I am asking him if it was credited to [183—108] the C. L. Boss personal account. A. No.

Q. All right. Now, then, turn to surplus. Now, this amount was—

A. \$1373.32.

Q. Transferred to surplus, was it, \$1373.32?

A. Yes, sir.

Q. What became of that amount?

COURT.—What is that amount there?

Mr. REILLY.—\$1373.32.

A. And half of that overhead, your Honor.

(Testimony of C. L. Boss.)

COURT.—He asked you what became of that.

A. That was divided in proportion to the interest in the copartnership between Mr. McRell and myself when it was determined the amount of money Mr. McRell could put up, and this account after it ran 30 days was discontinued, and the new copartnership absorbed in the going records the service, they absorbed in the going records profit and loss, as we went along, and those current items that came up like as I have shown in 30 days would keep coming, you see, after it was determined that Mr. McRell could not get the \$8000 that he hoped to get—he could only get \$5000, and I got \$33,500—then it was known that he would have that per cent of interest in the copartnership, and then instead of keeping so many accounts and not knowing just which account to put those different things in, some might get in the wrong account, we decided to absorb the losses and expenses that that money was set aside for in the current business as it went along. We kept the account for one month to see what they would amount to; and even before the profit and loss items came [184—109] in it was decided to cut it out, save bookkeeping.

Q. These profits that you cut up, the surplus was credited to the personal accounts of yourself and R. J. McRell, weren't they?

A. Yes, according to our individual interests, because the business which is our individual interest was to absorb those liabilities.

Q. Yes; but the profit, the surplus, so-called sur-

(Testimony of C. L. Boss.)

plus, from Boss & Peake, a corporation, was divided between you and McRell personally, and it is so shown upon the books under item of R. J. McRell and C. L. Boss personally, is it not?

A. Items as surplus to offset a liability were credited to ourselves because ourselves would absorb in the going business according to our percentages. It being a copartnership, the business would stand those shrinkages if we let it run into the current business at that time instead of running into a special account. And so we didn't continue the special account of those shrinkages. We did only continue it for 30 days. We were satisfied that if you have got to put service in one place on a Maxwell car and then something else in another place, and storage and insurance, etc., on your books, you would likely get your books mixed. There was no reason why we should keep two accounts, make two records on our books, and continue a record that at that time seemed to us needless, useless and an extra amount of work.

Mr. REILLY.—We will offer in evidence, if the Court please, the following item from the personal account of R. J. McRell in the ledger, under date of June 30th: "Division of surplus B. & P. A. Company, \$377.11."

Will there be any objection to the first one offered, [185—110] Mr. Smith?

Mr. SMITH.—All I am going to object is, I am going to ask for the entire account to go in; one item won't explain itself.

(Testimony of C. L. Boss.)

Mr. REILLY.—Then I am going to offer, if the Court please, the following item from the account of C. L. Boss personal, under date of June 30th: “Division of B. & P. Surplus, J 181, \$996.21.”

Mr. SMITH.—We have no objection to the whole account going in.

Q. Now, you did pay the various obligations of the Boss & Peake Automobile Company, did you not, as they arose?

A. Current business obligations, yes, sir.

Q. Well, any obligations that arose, you paid them, didn't you?

A. Current business obligations.

Q. Well, were there any that arose that you didn't pay?

A. Never paid this tax, because it was not a current business obligation that we knew anything about, and didn't assume and didn't know anything about it.

Q. You didn't pay the tax. Is there any other obligation? A. Not that I know of.

Q. Well, you know perfectly well there was not, don't you? A. Yes.

Q. And when this tax question came up, did you then consult with Mr. Peake?

A. I went down to the local office—

Q. Answer my question.

A. No, I didn't consult with Mr. Peake; no, sir.

Q. When did you first have any communication with Mr. Peake on the subject of this tax? [186—111]



(Testimony of C. L. Boss.)

A. When the Government sent me the notice I took and mailed it to Mr. Peake so he would get it at the same time that I did.

Q. When was that?

A. I guess the notice will have to explain. I got a letter back from him acknowledging it.

Q. When was that?

A. Just after they made the demand.

Q. In August, 1920?

A. The records will show when the demand is. I don't remember.

Q. Is this the letter that you wrote to Mr. Peake?

A. "I have just received notice—" Yes, sir.

Q. And that is dated what?

A. August 12, 1920.

Q. And that was the first communication you had with Mr. Peake about this tax?

A. I believe it was. I think so.

COURT.—That was August 12, 1920?

Mr. REILLY.—August 12, 1920, yes, your Honor.

Q. Now, long before you wrote this letter to Mr. Peake, long before you had any communication with Mr. Peake, you and your attorney had been filing affidavits and writing letters and having conferences with the income tax people, or with the taxing people to try to get one half of this tax assessed against Mr. Peake, were you not?

A. I believe we were, if I remember right now.

Q. What? A. I believe we were.

Q. Well, you know you were, don't you?



(Testimony of C. L. Boss.)

A. Well, as far as those dates are concerned, the records will show. You ask me up here; I can't just remember the dates.

Q. Well, you know that you were making these returns to the [187—112] Government, or these affidavits to the Government, and interviewing the taxing authorities long before the Government made the demand on you which caused you to write the letter to Mr. Peake, don't you?

A. Yes; yes.

Q. Months before?

A. The minute that the demand was made, if I recall right, I wrote that letter, as it states in the letter the demand had just been made, and I sent it on to him.

Q. But during the time that you and Mr. McRell were making these affidavits shown in Government's Exhibit 3, in fact, as far as a year before, you were writing letters. Just answer that, if you will. You were writing letters and making claims to impose a part of this tax upon Mr. Peake, and without any consultation or any reference to him? Is that right?

A. I was writing letters explaining the situation. These letters followed a letter written by Mr. Logan at the time we should first make our return, asking for a decision from the Government as to my responsibility in the matter; and this is one of the letters that followed, stating the facts that the Government wanted so as they could make their decision. I did go down at the proper time

(Testimony of C. L. Boss.)

and ask the local office my liability in the matter. They were unable to give me a satisfactory explanation. And then I went to Mr. Logan's office, and asked him to write a technical letter asking for a decision, and that I took it in person down there, and Miss Julia Kern pasted that letter on the report and sent it on to Washington, because at the local office they could not give an answer. And these other letters and correspondence carried on between that time and this time were brought out by the [188—113] Department asking information and I did write and answer their letters.

Mr. SMITH.—Mr. Reilly, will you let me call the witness' attention to the date of that letter you just inquired about?

Mr. REILLY.—The date of the letter is September 6, 1919.

Q. Is this the minute-book of the Boss & Peake Automobile Company?

A. Yes, sir; these are the records of the Boss & Peake Automobile Company, constituting the constitution, by-laws and minutes.

Mr. REILLY.—We will offer the entire book in evidence.

Mr. SMITH.—We will object to that offer, if the Court please. Your Honor can see that an entire book offered in evidence without interrogation as to any particular part, without directing the witness to any particular part, is very unfair to the witness. If counsel has any particular part of this record he wants to call to the witness' at-

(Testimony of C. L. Boss.)

tention, or if he will designate what point he has in mind against it, so we can examine the witness on it, I have no objection.

Mr. REILLY.—I have nothing against the book. In fact, I have a very fond regard for the book.

COURT.—It cannot aid the Court to put that whole book in.

Mr. REILLY.—Your Honor, I am particularly interested in that part of the minute-book beginning with the waiver of notice of stockholders' meeting to be held at the hour of 1:30 P. M. on May 31, 1917.

COURT.—To and including what?

Mr. REILLY.—To and including the—it is rather long, [189—114] your Honor, but it is all essential to show the corporate history of this organization—to and including the meeting of the directors, special meeting of the directors, held at 2:30 P. M. June 22, 1917.

COURT.—Well, let that part go in.

Mr. REILLY.—You will waive the reading of this at this time?

Mr. LOGAN.—Yes, we will waive it.

(Marked Peake's Exhibit "C," running to end of book.)

Q. Now, Mr. Boss, as I understand you, you have stated that the Boss & Peake Automobile Company ceased doing business on the 31st day of May, 1917? A. Yes, sir.

Q. Thereafter the only business that was done was that of the partnership?

(Testimony of C. L. Boss.)

A. Well, Mr. Peake signed a check June 1st before we went to the bank, paying the insurance item to Mr. J. C. Corbin, of the Corbin Company, of \$10.50; outside of that one little transaction, or after we went to the bank, banking hours, there was nothing. I don't even remember anything else on June 1st that was conducted.

Q. Now, when you took the money out of the corporation's bank account— A. Part of it.

Q. On June 1, 1917, and transferred it to your own for the purpose of completing this transaction, did you leave any money in the bank?

A. Oh, yes, there was some. That was only part of the money that was in the bank at that time.

Q. Was there a substantial sum in addition to that? [190—115]

A. There was some. Just what you would call a substantial—I don't know just how much there was, but I know there was enough money for current business at that time.

Q. You transferred this sum to your personal account in what bank?

A. It was just—I cannot recall the way the check was made out, but I transferred it to my own personal account in the First National Bank.

Q. You had had a personal account in the First National Bank for some time prior to that?

A. Yes, sir.

Q. And you continued a personal account in the First National Bank for some time after that?



(Testimony of C. L. Boss.)

A. Had it there for 18 years, run continuously.

Q. And you had other sums in that bank account when you put this sum in?

A. Yes, I had a balance in the bank.

Q. Yes, and you had other sums. You had money left in your personal account after you gave this check for \$26,000 odd to Mr. Peake?

A. Yes, there is three items specified which just cover that \$26,137 some odd cents.

Q. And you had other money in the account?

A. Yes, sir.

Q. And there was other money in the account all the time from the time before you deposited the \$8500 that you got from the corporation, and until after you had given Mr. Peake the check for \$26,000, there was money of your own in that account all of that time?

A. Yes; we didn't have an account of the new copartnership, and that was used as a means for an end. [191—116]

Q. Now, these books show, particularly the combined cash and journal don't seem to show any change in the business between May 31st and June 1st, do they?

A. They were not run very good.

Q. Well, answer my question. Do they, or do they not? A. Yes; yes, they do.

Q. The books show?

A. In the final books. The original entries don't show very good, but then the final books show it all right.

(Testimony of C. L. Boss.)

Q. The combined cash and journal, it was run on from day to day, was it not? A. Yes.

Q. And wasn't made up later? A. No.

Q. This was made as the business was handled?

A. That was under Mr. Peake's directions, with Mr. Murphy as bookkeeper.

Q. After Mr. Peake got out, it was under your direction? A. Yes.

Q. And it was handled right as the transactions happened? A. Not necessarily.

Q. Well, within a very short time?

A. The bookkeeper sometimes may be delayed in entering up his items, he may be just a little careless, but they show in the books, and the result.

Q. There is no distinction or differentiation or change whatever between the 31st day of May and the first day of June in so far as the appearance or form of entries is concerned, is there?

A. Yes, there is very distinctly, in the journal.

Q. In this combined cash and journal? [192—117]

A. Not in the combined, but in the journal.

Q. That is what I am asking you about. I am not asking you about the journal.

A. Where they should be there.

Q. This combined cash and journal runs along as though it were the book of the Boss & Peake Automobile Company for some time, don't it?

A. No, sir; just runs along like loose leaf systems of books generally run along.

Q. Let me call your attention to the 19th day of

(Testimony of C. L. Boss.)

June in this book, and which is shown on page 136 of the combined cash and journal, and call your attention to an item there reading as follows: "Clearing account transfer from Boss & Peake Automobile Company to C. L. Boss & Company," evidently meaning C. L. Boss Automobile Company, and ask you to explain that item on June 19th.

A. I guess I will have to have the Government auditor explain this, because I didn't keep the book. The idea is this: that clearing account — Mr. Murphy had an adjustment account, when his books didn't balance he charged the difference into it, and this clearing account here is new to me at this time. I don't know just the significance of that. I guess I will let the Government auditor answer that, because he checked the books for the corporation and checked the books for the copartnership, and what clearing account is—that is a new one to me.

Q. You don't pretend to say that is an adjustment account that had been carried on by Mr. Murphy?

A. I don't say what that is at all. I want the Government auditor to explain. I don't know at this time what it is. [193—118] It seems at this time it is beyond my recollection what that clearing account is.

COURT.—What is the amount of it?

A. \$4223.91.

Mr. SMITH.—\$4223.91?

Mr. MAGUIRE.—Yes.

(Testimony of C. L. Boss.)

Mr. REILLY.—We would like to offer the item that I read to your Honor on page 136 of the combined cash and journal in evidence.

COURT.—You will have to have a page in there to refer to.

Mr. REILLY.—We will offer the page in evidence.

(Marked Peake's Exhibit "D.")

Mr. REILLY.—We will also offer in evidence page 119 of the combined cash and journal, calling attention particularly to the following item under date of June 1st: "C. L. Boss," and under the heading General Ledger Charges, \$8537.15, shown by check No. 2595, for the same amount.

(Marked Peake's Exhibit "E.")

Q. What is that, Mr. Boss, which was charged to you on the first day of June in the corporation's books? A. That was a check charged to me.

Q. Check from whom?

A. Boss & Peake Automobile Company.

Q. For the amount that you paid, this amount you were telling about?

A. Together with the check Mr. Peake made and the money I borrowed, so that the dissolution and division could be made at that time; just a book-keeping item of the copartnership, which three items made up the total sum that was given to Mr. Peake, in distribution and dissolution of the physical assets [194—119] of the Company.

Q. That occurs in this combined cash and journal of the day preceding the entries relating to the



(Testimony of C. L. Boss.)

charge to Mr. Peake of \$10,000 and \$15,000 and salary, to which you referred in your direct testimony, doesn't it?

A. The entry is entered the day previous.

Q. That is the entry of this charge against you on account of the check given by the corporation is entered the day previous to these other transactions? A. The transaction—

Q. Answer the question first, and then explain.

A. Yes, sir. The transaction was made the same day. Momentary occupation of the bookkeeper caused him to enter the other transaction a day later than when it took place.

Q. How do you know what momentary transactions the bookkeeper had?

A. Because it was carried into the balance as May 31st, part of the next day's transaction. The next day's transaction, the original entry of the salaries was entered a day too late. May 31st it was placed back in the final balance as of May 31st, and the books show it was entered June 2d.

Q. Now, Mr. Boss, you were unable to explain to us a moment ago this clearing item, what that sum represented? A. Yes.

Q. I called your attention to page 136, which is marked Peake's Exhibit "D." Now, let me call your attention to page 135 of the same book, where this same item appears, and opposite it is found check No. 2804. Now can you tell us what that is?  
[195—120]

(Testimony of C. L. Boss.)

A. No, I cannot. I don't see anything here that would say what it was for.

Q. It shows that check was written for the amount? A. No.

Q. Doesn't it, isn't there the check number?

A. No; no.

Q. What is that column headed?

A. Yes, that is check number, yes.

Q. That shows that check was issued for that amount, does it not?

A. Yes, it would indicate that, yes.

Q. And page 136 shows that it was issued to the C. L. Boss Automobile Company from Boss & Peake Automobile Company, does it not?

A. That shows it was charged to C. L. Boss Automobile Company.

Q. And shows that it came from Boss & Peake Automobile Company, does it not?

A. It indicates that from the bookkeeping here, yes, sir.

Mr. REILLY.—We offer the preceding page, page 135.

(Marked Peake's Exhibit "F.")

COURT.—What was the date of that?

A. June 19th, your Honor; both of them June 19th, this clearing account.

Q. Now, Mr. Boss, to leave that for a moment and turn to this conversation which you had at the depot, with Mr. Peake. You say that Mr. Peake met Mr. McCornack, Sales-manager, was that his title? A. Yes, sir.

(Testimony of C. L. Boss.)

Q. Of the Hudson Motor Car Company, at the depot?     A. Yes, sir.

Q. When Mr. Peake arrived at the depot, he met Mr. McCornack. [196—121] Did he find anybody with him?     A. Mr. McRell and myself.

Q. And was Mr. Peake at the depot in response to an invitation from yourself or Mr. McRell, or Mr. McCornack?     A. No, sir.

Q. How long had Mr. McCornack been in town at that time?     A. He came in the day before.

Q. How much of the time between the day before and the time that Mr. Peake met Mr. McCornack at the depot had you been with Mr. McCornack?

(Objected to as incompetent, irrelevant and immaterial.)

(Objected overruled.)

A. I had been with him in the afternoon and evening of the day before, and considerable of the time that day.

Q. Did you meet him on his arrival in town the day before?     A. Yes, sir.

Q. Did you meet him at the train?     A. Yes, sir.

Q. Did you take him to the place of business of the Boss & Peake Automobile Company?

A. No, sir; he didn't want to go.

Q. Did he go there at any time during the time he was in town on that trip?

A. No, I could not get him to go.

Q. You tried to get him to go?

A. I did. I tried to have him meet Mr. Peake.

(Testimony of C. L. Boss.)

Q. You besought him to go up and meet Mr. Peake, and he refused to do so?

A. A number of times. [197—122]

Q. When you say a number of times, you mean during those two days? A. Yes, sir; I did, yes.

Q. He absolutely refused to meet Mr. Peake.

A. Absolutely. He absolutely refused several times to meet Mr. Peake.

Q. How long before Mr. McCornack left town was it that Mr. Peake discovered him at the depot?

A. About 35 minutes.

Q. About 35 minutes before he left town?

A. Yes; the train was late.

Q. How many times had Mr. McCornack been out here in Portland during the life of the corporation before this date? A. Hadn't been out here.

Q. Never had? A. Not to my knowledge.

Q. It was his only visit to the city of Portland during the history of the corporation?

A. Yes, sir.

Q. And on that one visit he didn't go near the place of business of the corporation?

A. And he would not go near it.

Q. And he would not go near it? A. No, sir.

Q. And he refused to meet the owner of half of the stock of the corporation? A. Yes, sir.

Q. Then, as I understand you, Mr. Peake came down and broke into the happy gathering that you and Mr. McRell—by the way, what was Mr. McRell's business in the corporation at that time?

A. He was not in the corporation.



(Testimony of C. L. Boss.)

Q. Was he a salesman there? [198—123]

A. He was the representative of Boss & Peake in the territory, making contracts with the dealers in the territory.

Q. And how much of the time that you were with Mr. McCornack during his two-day visit here was Mr. McRell with him likewise?

A. Until about the evening time, when Mr. McCornack dismissed him and took me up to his room in the hotel.

Q. And gave you a drink?

A. No, he don't drink. Mr. McCornack would get offended if anyone offered him a drink.

Q. That sounds improbable with that name.

A. He is a Scotchman, not an Irishman.

Q. All right. As I understand, Mr. Peake came down to the depot where you and Mr. McRell were bidding Mr. McCornack good-bye?

A. Yes, sir; waiting for his train, which was 35 minutes late.

Q. If his train had not been late, Mr. Peake would have arrived just after he had left?

A. Just about the time it would have pulled out. He came there just about the time it was due to go out.

Q. He immediately attempted to get Mr. McCornack to turn over the agency for the Hudson car to him personally?

A. Not immediately, no. He went after me right in front of Mr. McCornack. That is what he im-

(Testimony of C. L. Boss.)

mediately did. I said, "Tell it to Mr. McCornack. He is here. Tell it to him."

Q. Tell what to him?

A. He said if the Hudson Motor Car Company would listen to him, Mr. Peake, they would look at it in a different light, because he was a financial man.

Q. Look at what in a different light?

A. What he called the controversy between himself and myself. [199—124]

Q. Well, didn't he specify what that controversy was?

A. Oh, he started in at me with several things. I don't remember just the detail, but he held me responsible for Mr. McCornack not meeting him, right there.

Q. Of which you were entirely innocent?

A. Absolutely.

Q. So at that meeting the sale or arrangement, or whatever you call it, was perfected?

A. Not until Mr. McCornack had left to board the train, and not until—he didn't leave until Mr. Peake had made his overtures for the Hudson agency, and had been questioned by Mr. McCornack, and Mr. McCornack had given him his reply.

Q. What were these so-called overtures that Mr. Peake had made? What were they? What did he say?

A. He said that if the Hudson Motor Car Company would listen to him they would look at it in a different light.

(Testimony of C. L. Boss.)

Q. Is that all he said?      A. No; no.

Q. What else did he say to Mr. McCornack in the nature of overtures? Let us have it.

Q. That he was a financial man; that he was the one that was responsible. To give his words, I don't just recall, except in a few lines. Mr. McCornack turned to him quickly—

Q. No, wait. I want to get what Mr. Peake said. Never mind what Mr. McCornack said. What did Mr. Peake say?

A. He says, "If the Hudson Motor Car Company would listen to me, you would look at it in a different light." Mr. McCornack braced up, and said, "I am the Hudson Motor Car Company."

Q. Never mind what the Hudson Motor Car Company said. I want to know what Mr. Peake said. Did he say anything else you remember?  
[200—125]

A. Yes, he wanted the Hudson agency; but I cannot remember his words.

Q. He stated to Mr. McCornack at that time that he wanted the Hudson agency?

A. Would like it.

Q. What?      A. Yes, sir.

Q. That is what he said?      A. Yes, sir.

Q. That he wanted to get the agency and run the business himself?

A. Well, he didn't say he wanted to run the business. He wanted to get the agency. That would follow, that he wanted to run the business.

(Testimony of C. L. Boss.)

Q. Mr. McCornack refused to give him the agency?

A. Mr. McCornack asked Mr. Peake what part of the work he was doing there.

Q. Yes; and Mr. Peake said, what?

A. Explained what he was doing; and Mr. McCornack said he understood that he was financial man, and he would think, as financial man his time was worth more than the work he had been doing for the Boss & Peake Automobile Company.

Q. Let me call your attention, Mr. Boss, to an affidavit that you made to the Government, in respect to this tax matter, found in the photostat copy which has been marked "Government's Exhibit 3," in which you state that thereafter—after having detailed the formation of the corporation—"That thereafter"—"Hereafter," it says; it should be thereafter, "And at the outbreak of the great war the said E. W. A. Peake became alarmed as to the future, and particularly as to the financial market condition of the automobile business and sought thereafter either to control the whole corporation or to bring about a dissolution or liquidation thereof." Now, then, do I understand [201—126] that you still—

Mr. LOGAN.—You want to read the balance of it.

Mr. REILLY.—The balance of it has nothing to do with the question I am asking him. I can read your whole oration that you delivered here in attempting by ex parte proceedings, to which we



(Testimony of C. L. Boss.)

were not invited, to make the Government think that we ought to pay your tax, but I don't think we have to. You can argue that to the Court.

Q. Do you still subscribe to the statement contained in your affidavit and the similar statement contained in your various answers in this case, to the effect that Mr. Peake was alarmed at the state of the automobile business, and at the same time subscribe to the statement that he went down and tried to get the agency away from you, to try to run it himself alone?

A. Yes. It was the difference between the way an automobile man looks at it and a financial man. He wanted to sell automobiles and then order them from the factory. I was ordering automobiles, based on experience, according to the demands of the business. And Mr. Peake would get so alarmed at the number of automobiles that I was ordering that one time he told me that he walked by his home three times—didn't know when he got home, didn't know where his home was—he was so worried. Now, then, I used to get out all the contracts with the dealers, all the contracts of automobiles sold at retail, and show him that—the number that was shipped and the number that was on hand and the number that was ordered, and then take these and show [202—127] him what would be left, and our liability would only be what was left.

Q. Let me interrupt you there, Mr. Boss, in your speech.

(Testimony of C. L. Boss.)

A. He would take and figure the dollars and cents of the total amount and the amount was so much that it would really paralyze him. Now then, he was looking at it from a dollars and cents point, and I was looking at it from the sales end.

Q. As a matter of fact, in that transaction you were making him put up extra capital out of his pocket, keeping the business going and keeping the cars moving, weren't you?

A. It was what he agreed to do, and what he received a compensation for doing; and he did that when he told me he had ready money, and when he didn't he took the loan from the bank.

COURT.—Did he take the loan for himself or for the corporation?

A. He took the loan for the corporation—had the corporation take the loan. And when he had ready money, he would take it from his ready money.

COURT.—That is, he would loan it to the corporation?

A. Yes, sir; and get interest on it, and get security for it.

Q. Now, as a matter of fact, the amount which Mr. Peake got, and the amount he agreed to take in that conversation at the depot, was \$25,000 even, plus the salary which he said he had earned? Is that right?

A. It was not. It was never mentioned.

Q. \$25,000 was never mentioned?

A. Never mentioned. [Neither was his stock mentioned. He said, "I must have my salary, I

(Testimony of C. L. Boss.)

must have the capital, I must have my net profits, which I estimate on the business to be \$20,000," leaving that difference between twenty thousand and some twenty-two thousand, over \$2000, to cover the [203—128] liabilities.

Q. So he said that he wanted a sum which you say, by a system of mental arithmetic or the system of words he used, was an even \$25,000, out of the transaction? A. No, sir; I did not say that.

Q. Plus his salary? Is that right?

A. I do not say that.

Q. That is what he got, isn't it?

A. No, sir; it isn't.

Q. Didn't he get \$25,000 plus his salary, plus this little amount for the desk? A. No, sir.

Q. How much did he get?

A. The time he made that statement I brought it up, and the next day after the transaction Mr. Murphy entered it in the books in his own handwriting, just as Mr. Peake demanded it, and just as I accepted his demand.

Q. How much money did he get?

A. \$26,137 and some cents.

Q. Isn't that \$25,000 plus the salary plus allowance for the desk and chair?

A. No, sir; that is an afterthought.

Q. Isn't that what it is?

A. No, sir; that is an afterthought.

Q. What do you mean by an afterthought?

A. When the excess war profits were taxed he

(Testimony of C. L. Boss.)

went back and covered the period. That is a thought that came up afterwards.

Q. You still insist the amount he got was not \$25,000 plus the desk and chair and salary?

A. I still insist. [204—129]

Q. All right. Now, when this contract was drawn by Mr. Logan, by which you offered to buy; or rather asked him to sign, giving you an option to buy his stock in the corporation on July 1st, the value to be fixed by an inventory, didn't Mr. Peake say to you that he would not sell on an inventory basis, that there would be no sharpening of the pencil when he came to sell out?

A. No, sir.

Q. No such conversation occurred at all?

A. No, sir. That don't say on inventory. That says on open account and inventory. That means he would get everything—profit, capital and everything.

Q. This speaks for itself.

A. That was his proposition, not my proposition.

Q. Drawn by your attorney?

A. I took it down to my attorney and had him draw it out on his proposition and brought it up to him.

#### Redirect Examination.

Q. Mr. Boss, referring to page 119, there is one question I don't believe has been asked of you yet. I overlooked it in direct, and I think counsel in cross-examination also. You spoke in your direct examination of Mr. Peake taking eight automo-



(Testimony of C. L. Boss.)

biles, and later there being represented by conditional sale notes and warehouse receipts like these, the aggregate amount of eight at \$1200 each, being \$9600? A. Yes, sir.

Q. Will you tell the Court whether the C. L. Boss Automobile Company ever paid those sums to Mr. Peake?

A. We paid for those notes in addition to this distribution of \$26,137 and some cents. [205—130]

Mr. REILLY.—In addition to it? You mean Mr. Peake got \$35,000?

Mr. SMITH.—Wait, Mr. Reilly, if you please. I will turn him over in due time.

Mr. REILLY.—All right.

Q. Referring to this time on page 119 of this combined ledger—page 119 of this combined cash-book and journal, this charge by check 2595 of \$8,537.15 to C. L. Boss, what is the date of that, please, in there? A. This is entered up as of June 1st.

Q. Is that the same \$8537.15 item that shows up in your deposit slip of June 1st?

A. Yes, sir; that is one of the three items that make the \$26,137.15.

Q. So you took that check and put it in this deposit to make the \$26,000 that went to Mr. Peake?

Mr. REILLY.—What about that check? Have you produced it? Have you produced that check, Mr. Boss?

A. I saw Mr. Steel just for a minute, and he said he thought he could get it all right; but we had

(Testimony of C. L. Boss.)

to leave. We got all these other pages, and by to-morrow morning maybe he will have it all right. In a bunch of old stuff, he don't know just where to look for it, but he is digging after it.

Q. Now, will you please turn to pages 135 and 136 of that combined cash and journal and refer to this item \$4223.91, being check numbered 2804, and state whether one of those entries is a debit and the other a credit—if so, state which is the debit and which is the credit—of the same item?

A. One is a credit and one is a debit.

Q. Which page is the credit and which is the debit? [206—131]

A. The debit is 135 and the credit is 136.

Q. In winding up the old affairs of the Boss & Peake Automobile Company, and transferring the business and the assets over to the C. L. Boss Automobile Company, were you doing that at the time and through the time that these entries were made in that part of June?

A. We were doing it continuously until all the old affairs were wound up. We might have had a note or something of that kind which would run a long time; that is, an automobile might be sold on a note that we would have to take up. It would be a note indorsed by the Boss & Peake Automobile Company, and we would have to take it up. The date that all these old affairs were settled was indefinite; it was continued.

Q. Did you have to handle items as they came up from day to day, from time to time?

(Testimony of C. L. Boss.)

A. Yes, sir.

Q. Counsel was asking you to point out in the combined cash and journal whether there was any closing of the old accounts in that book as between the different organizations.

A. No, sir; it don't have the closing entries in the combined entry with the cash. It has them in the journal, and they are there; and in the ledger, and they are there.

Q. Take first the ledger, and show us where they were closed, if you can, and then the journal.

A. The journal—

Q. Well, the journal comes first, yes.

A. They are entered in the journal and then go into the ledger.

Q. Yes.

A. The final entries on the journal are on pages 159-a and 159-b. [207—132]

Q. Those are all in whose handwriting?

A. Mr. Murphy's, the bookkeeper.

Q. What are the pages they are closed in the ledger?

A. As an illustration, on the Super Six merchandise account—

Q. That is the Hudson Super Six, is it?

A. Hudson Super Six merchandise account, that entry showing \$22,923.79 profit on those individual Hudson cars, carried into this from the sundry account, showing \$22,923, and that amount is \$22,923.79. That is the profit on this account. This is the account where the Hudson car account was

(Testimony of C. L. Boss.)

transferred into the sundry account, and the sundry account profit was transferred to the Super Six merchandise, and in the closing entry the profits from this account were journalized—

COURT.—Journalized first, isn't it, and then carried into the ledger?

A. Oh, yes, journalized first.

Q. The books were ruled off at that time, as we say?

A. Yes. And each individual account was closed up, and the books were closed up at that time.

Q. Now, after May 31st, 1917, did Mr. Peake stay around the former business place of the Boss & Peake Automobile Company?

A. Only the morning of June 1st.

Q. Now, in the cross-examination about your transaction with Mr. McCornack representing the Hudson Automobile Company, it was brought out that he would not meet or did not care to meet Mr. Peake. Did he tell you why? A. Yes, sir.

Objected to as incompetent, irrelevant, immaterial and hearsay; not binding upon Peake. [208—133]

COURT.—I will hear that. I came pretty near asking the same question when you were cross-examining.

A. He said he had sent a representative by the name of Barrett into this territory twice; he had gone all over the state, investigated from the dealers and investigated locally in Portland, and investigated from the members in our institution in



(Testimony of C. L. Boss.)

regard to both Mr. Peake and myself; the trips were made, sixty days' time elapsing between the two trips; and his report Mr. McCornack was acting upon, and he had decided before he came to Portland that he would side with the automobile man and not with the financial man.

Q. Now, Mr. Boss, there is one matter I wanted to clear up in the record. I don't believe that it has been brought out clearly yet. It relates to those three entries, where there is a \$10,000 credit, I believe it is, given to Mr. Peake, and eleven thousand three hundred and something given to you, and another item under that of \$1373. Will you turn to that on the book, please?

A. In the journal?

Q. In the journal. Those three items, you have them before you.

Mr. REILLY.—It is in the profit and loss account of the ledger.

A. Just a minute now. He is asking me.

Q. Referring to the ledger, and the profit and loss account as shown in the ledger, and also the profit and loss account as shown at page 159-a of the journal. A. Profit and loss entry.

Q. Yes, profit and loss entry. The \$10,000 item relates to what?

A. The net profit to Mr. Peake. [209—134]

Q. And the \$11,373.32 relates to what?

A. The net profit and half of that liability on my account. The other half was undetermined at

(Testimony of C. L. Boss.)

the entry, because it was undetermined what Mr. McRell would put into the business.

Q. Of the \$11,373.32 item that is to your account, how much of that was profit? The \$10,000?

A. \$10,000 net profit.

Mr. REILLY.—Just a moment.

COURT.—That was quite leading.

Mr. REILLY.—Yes, and the books show what the item is.

Q. Let us get back here to profit and loss in the ledger. In addition to those two items in the ledger there appears, under date of June 1st, an item called surplus \$1373.32. What is that item, please?

A. That item is one-half of the liability amount after the net profit in the business was estimated from the satisfactory supplemental statements.

COURT.—Why one-half?

A. Because one-half was put into my account, as I was to carry the liability, and the other half was to go to me and to McRell, who were to carry the liability, and he didn't know what his proportion would be, and I couldn't tell him until he decided how much capital he would put up.

COURT.—Mr. Peake had nothing to do with the business after he sold out? He had nothing to do with the business of the new company after he sold out?

A. No, after he took his distribution.

COURT.—How does that affect Peake?

A. How did it affect him?

(Testimony of C. L. Boss.)

COURT.—Yes. [210—135]

A. Why, in the proposition of the dissolution Mr. Peake said he must have his net profit, and he estimated that this over-amount would cover the liability, which was the current business liability; not the excess war profits tax, which we didn't know of; and that current liability was the service on the cars, detailed as I spoke about in that account, and the profit and loss on the notes that we had indorsed. That amount was set aside, that over \$2700 to cover that liability. Now, then, in bookkeeping one-half of that amount set aside was put into my account, and the other part of that was divided between McRell and myself when it was determined the amount of money he could put up, and the reason that we divided that was—

COURT.—Well, you have been all over that. There is no use repeating it.

Q. Why wasn't that \$1373.32 item, which is the exact amount of the excess over \$10,000 that you got in your eleven thousand dollar credit, also charge, why was not that single item there credited to Peake?

A. Because in the distribution he was to have the net profit and take no business current liability, and that \$2700 covered business current liability, as I explained before.

Q. Those two items of \$1373.32 amount to twenty-seven hundred—what is the aggregate of those two thirteen hundred dollar items there?

A. \$2746.64.

(Testimony of C. L. Boss.)

Q. Now, what items did you agree to take care of by virtue of leaving that as it was and not charging any of it to Peake?

A. The current business items; that is, not any excess war profit tax, but what was known in business, the current business items only; the liability of the business, the [211—136] current business items, so that no account lawsuits on current business and the current liabilities that happened in the business, in business transaction, or anything of that nature, would fall back on him.

Q. Suppose, Mr. Boss, that I had bought a Hudson Super Six car from Boss & Peake Automobile Company in April, 1917, would there be any current liabilities on that car estimated in this \$2700 item?

A. Yes, the service.

Q. The service. What does that include? Just explain it to the Court.

A. If your machine didn't work right, you would come up there, we would give you free service for a stipulated length of time; and if your machine didn't work right after the contract time, if there was a defect in it, we would give you the labor and the factory would furnish you the part, so that you would have satisfaction.

Q. Did you and Mr. Peake agree on that sum of twenty-seven hundred dollars and some cents that was set aside for those purposes?

A. At the depot, the amount was just a little over two thousand dollars. On June 1st it amounted to \$2746.64.



(Testimony of C. L. Boss.)

Mr. SMITH.—That is all. I wanted to clear that matter up, if the Court please. I think that is all unless Mr. Boss wants to go ahead with his explanation.

COURT.—I think I understand the situation.

A. The amount did not contemplate any liability not known at that time.

Recross-examination.

Mr. MAGUIRE.—Just a minute, Mr. Boss.

COURT.—You better confine yourself to one counsel. [212—137]

Mr. REILLY.—May we ask permission of the Court for Mr. Maguire to ask a couple of questions?

Mr. MAGUIRE.—I want to ask one question about the books.

COURT.—Very well.

(Questions by Mr. MAGUIRE.)

If you will turn there to the page 120, are those items that are scheduled here, \$15,000 and \$10,000, as charged to Mr. Peake, were those entries upon the books of the corporation?

A. Yes. This item was. It was posted back on the corporation's books and got in the balance of May 31st. That is salary.

Q. I am not talking about salary.

A. And this stock account—

Q. Yes.

A. And this, we are on the corporation. This original entry here, of June, is in the balance as of May 31st. By correct bookkeeping it is a little

(Testimony of C. L. Boss.)

irregular. There are lots of those little irregular entries in the books during that period.

Q. Is this part of the corporation books here, that I am getting at here, including this page 120?

A. The books were the same books, with the exception of the ruling off, closing up; the same stationery, we ran on until we got new stationery, the same as McAdoo *used the* railroad business during the time that he had the railroad.

Q. Now, would you kindly answer the question? Are those entries on this page entries in the books of the corporation? A. Books that were—

Q. No, part of the records of the corporation?

A. This entry is part of the record of the corporation.

Q. All right, sir. Those entries on that page are all part of the records of the corporation, aren't they? [213—138] A. No, sir.

Q. What are they?

A. They are the records, the majority of them of the C. L. Boss Automobile Company, but this one item did not get in. Mr. Murphy did not get the items, item of the day, in order to enter it; but this is his handwriting, and he wrote them the following day in the book, and he wrote them the day beyond what he should have written them. He should have written them as of May 31st.

Q. Look at these bills payable. Are those bills payable there? What is that a charge to—bills payable to what?

(Testimony of C. L. Boss.)

A. That is charged to bills payable on the books of the C. L. Boss Automobile Company.

Q. Is there any distinction there upon your books between bills payable at that time—between bills payable of the C. L. Boss Automobile Company and bills payable of the Boss & Peake Automobile Company? A. Yes, in the ledger.

Q. But those accounts appear prior here to these accounts which you balanced off Mr. Peake's account in the corporation, don't they?

A. How is that?

Q. They appear prior upon your cash-book to the entries upon which you balanced off Mr. Peake's account in the corporation?

A. The entry in this account was out of place, but these books and these books—the final books, not the original entry book—these final books the account was corrected.

Mr. RILEY.—May I ask a further question on a different subject? Mr. Maguire was familiar with that book entry was the reason he wanted to ask it.

COURT.—Very well. [214—139]

(Questions by Mr. REILLY.)

You say, Mr. Boss, that Mr. McCornack said he had sent Barrett out to investigate yourself and Mr. Peake, and he had decided to side in with you as an automobile man. Side in with you on what?

A. On the apparent controversy.

Q. How did Mr. Barrett or Mr. McCornack know anything about any apparent conflict?

Objected to as incompetent.

(Testimony of C. L. Boss.)

A. Mr. Barrett was their service man, with headquarters at San Francisco, and he was sent up into this territory to investigate the condition of the Portland agency. They did not have any sale territory representative on the road at that time.

Q. All right. Who told Mr. Barrett anything about any differences of opinion between you and Mr. Peake?

A. I was ordering goods, and Mr. Peake was canceling them. I suppose that would be enough.

Q. Was there anything else?

A. I cannot recall just the—what would lead the Hudson Motor Car Company to look after their own business. They are very keen on handling their own business and following up any cue. I know that Mr. McCornack told me, when I signed the contract, that he thought I was making a mistake to go in with Mr. Peake.

COURT.—I think you better not go into that.

Q. So that all that you know is that they learned of some apparent conflict?

A. No, that ain't all. If you say that, I want to go on and explain.

Q. All right. Go ahead.

A. Mr. Peake went down to the factory in September, before [215—140] the corporation was formed, to buy an automobile, or there about the time, and as Mr. McCornack said, he bulled his way through and they took a disliking to his procedure.

COURT.—I don't know how that affects this



(Testimony of C. L. Boss.)

case. There was a conflict there. I think that is sufficient.

Mr. REILLY.—All right.

Q. On what date was the check account of the C. L. Boss Automobile Company opened in what ever bank it was put into?

A. I don't recall that at all.

Q. Where is the bank-book of C. L. Boss Automobile Company? A. I will have to investigate.

Q. Will you have that here in the morning?

A. Try to, yes, sir.

Q. What? A. I will try to get it, yes, sir.

Q. Is there any doubt about your ability to get your bank-book?

A. These records were all taken out of our office when we repainted, and dumped into a big box, and I did have a whole lot of trouble in getting what we wanted out of that box, and we had a long time to hunt for it; and not only that, but there were a number of leaves of the current copartnership and records and everything, that could not be found; and not only that, but at the time that the collector checked them up we did not have everything even of our own current business at that time, after June 1st.

Q. What bank did you open the account in for the C. L. Boss Automobile Company?

A. The Lumbermen's National Bank.

Q. That was the first account that the C. L. Boss Automobile Company had? A. Yes, sir.

Q. The Lumbermen's National Bank?

(Testimony of C. L. Boss.)

A. Yes, sir. [216—141]

Q. Now consolidated with the United States?

A. Yes.

Redirect Examination.

Mr. SMITH.—There were two matters the opposition had us bring up I wanted to ask Mr. Boss some questions on.

COURT.—Very well.

Q. I refer to these two sheets you brought in at the request of the opposite side to-day, one marked "Sheet No. 1, C. L. Boss Automobile Company, C. L. Boss Capital Account"; the other, "Sheet No. 1, C. L. Boss Automobile Co., R. J. McRell Capital Account." I wish from those accounts you would tell the Court what capital you have in the C. L. Boss Automobile Company.

COURT.—How does that affect this case?

Mr. SMITH.—In my judgment it does not. I just wanted to explain the matter if the Court cares to see it—get the whole situation. I wanted to make the offer of the explanation. That is all.

COURT.—Were those sheets offered in evidence for the other side? A. They asked for them.

Mr. SMITH.—They were produced at their request. They started to examine Mr. Boss on them and never offered them in evidence.

Mr. REILLY.—Put them in the right place in the ledger and put them in.

A. These are our present business.

Mr. REILLY.—These are not the sheets we asked for at all.

(Testimony of C. L. Boss.)

A. Where did McRell capital account come in? This is the first one he ever had.

COURT.—If they have not been offered that is sufficient. [217—142]

Mr. REILLY.—We would like the witness to produce the capital account sheets of C. L. Boss and R. J. McRell in Boss & Peake Automobile Company.

A. Mr. McRell never was in that, never had any stock.

COURT.—Then you may produce your own.

Mr. SMITH.—This is C. L. Boss capital account in C. L. Boss Automobile Company.

COURT.—I don't see what C. L. Boss Automobile Company has to do with the Boss & Peake Automobile Company.

A. Your Honor, the capital account in the Boss & Peake was capital account—not mine in particular. It was just the one capital account, and it is in this book now, and it is the only capital account there was. It was capital account of \$35,000, and included both capital accounts.

COURT.—What has that to do with this case?

Mr. SMITH.—Counsel asked for them.

Mr. REILLY.—That is not what we asked for.

COURT.—I think it may end here.

Mr. LOGAN.—They asked for capital account of Mr. McRell, and Mr. Boss is exercised over the fact that Mr. McRell never had a capital account.

COURT.—Mr. McRell never was concerned in the Boss & Peake Automobile Company. It was in the C. L. Boss Automobile Company.

(Testimony of C. L. Boss.)

Mr. REILLY.—The minutes connect Mr. McRell up with the Boss & Peake Automobile Company after Mr. Peake had sold his stock, your Honor. I want them to produce the sheet showing it.

COURT.—If you have that sheet, produce it.

Mr. LOGAN.—We will. I want to make an explanation, your Honor. This ledger has the capital account. Mr. Boss is not aware of the whereabouts of either the capital account of Mr. Peake or Mr. Boss. [218—143]

A. There isn't such a thing. It is one capital account. The \$30,000 is in it.

Mr. LOGAN.—There isn't an E. W. A. Peake capital account in it. There is just capital account, including Mr. Boss and Mr. Peake.

Mr. REILLY.—There is a ledger sheet showing there is a capital account of both Boss and Peake.

A. Here is your capital account.

Q. Does this capital account appear regularly in the ledger which has been produced here?

A. Yes.

Q. What page, if at all, is it numbered?

A. This page here.

Q. Is that the capital account of the Boss & Peake Automobile Company? A. Yes, sir.

Mr. SMITH.—We will ask to have it marked for identification, and offer it in evidence, if the Court please.

Mr. REILLY.—No objection.

(Marked Boss' Exhibit "F.")

Mr. MAGUIRE.—Mr. Logan, here in your com-



(Testimony of C. L. Boss.)

bined cash-book and journal you have reference to E. W. A. Peake capital account and C. L. Boss capital account, and neither of them is there—neither of them is entered in the capital account.

Mr. LOGAN.—We will have Mr. Murphy explain that when he comes on the stand.

Mr. MAGUIRE.—They don't correspond.

Mr. LOGAN.—I am just as anxious to get them as you are.

Q. Mr. Boss, this capital account sheet marked Boss' Exhibit "F" was in this book yesterday when we turned it over to the other [219—144] side to investigate? A. Yes.

Q. Do you know of any other capital account sheet of the Boss & Peake Automobile Company, other than the one to which you have referred?

A. No. There is that account there they said don't correspond. You see it is posted as of May 31st into that capital account sheet there of mine; and capital account of Mr. Peake's, I was looking for the other day and couldn't find it. I was trying to find it myself.

Q. And in this capital account that appears here, what is the date of the first entry on the credit side?

A. November 25, 1916.

Q. And those entries continued down to what date? A. To December 14, 1916.

Q. And on the debit side what is the date of the entry? A. Journal entry, where the stock—

Q. June 2? A. January.

Q. I thought it was June.

(Testimony of B. B. Weldy.)

A. Well, I can't say whether it is June or January, 1917.

Excused. [220—145]

**Testimony of B. B. Weldy, for the Defendant  
(Recalled).**

B. B. WELDY, recalled for defendant Boss.

Direct Examination.

(Questions by Mr. SMITH.)

Mr. Weldy, do you recall Mr. Boss turning over to you when you were investigating this affair the documents and data and records and memoranda of the Boss & Peake Automobile Company?

A. I do. There is a mass of it.

Q. There is a mass of it? A. Yes.

Q. Do you know whether among that mass of documents he gave you there were any of these so-called satisfactory settlement sheets?

A. I presume so. I would not call them by that name. I would term them trial balances.

Q. Trial balances?

A. Yes. Now, they may be under another name, as far as they are concerned, but that is what I would term them.

Q. Trial balances? A. Yes.

Q. In handling the affairs of a corporation what account is there appears in any of the books as a capital account? A. Simply the capital account.

Q. Will you explain what it embraces or to what items it refers?

(Testimony of B. B. Weldy.)

A. It embraces the capital that is invested in the business.

Q. I will show you Mr. Boss' Exhibit "F," being the capital account that appears in this ledger, and ask you to examine it and explain what it means to the Court.

A. It means that on November 25, 1916, there are two items of credits, \$7500 each; on November 28, \$2500; November 29, another \$2500; December 14, two items of \$5000 each, the total of \$30,000 paid in in cash. It all comes through the [221—146] cash-book.

Q. Are there any books here of record to show from whom those sums were derived or paid or by whom they were paid?

A. There should be in the cash-book.

Q. Is the cash-book here, Mr. Boss?

COURT.—Hasn't it been admitted that \$15,000 was paid by one party and \$15,000 by the other?

Mr. MAGUIRE.—Yes, your Honor.

COURT.—What is the use of taking up the time of the Court if that is admitted?

Mr. SMITH.—All I want to say is that is the only capital account that would run through any books of the corporation.

Q. Is that right, or would there be a different capital account?

A. This is all that is necessary.

Q. I will hand you a document and ask you to state what it is.

A. It is a copy of my report to the Department

(Testimony of B. B. Weldy.)

Commissioner of Internal Revenue of the C. L. Boss Automobile Company, dated—

Q. Photostatic copy?

A. Photostatic copy of my report, dated February 27, 1920.

Q. Made after full investigation of all these books?

A. Yes, sir. This was made before I made the examination of the Boss & Peake Automobile Company, beginning January 27th and ending February 10th. The report and examination of the Boss & Peake Automobile Company was made in between here when I discovered that there was such a corporation doing business, or did business before this partnership was in existence. So this report of examination was made by [222—147] myself and a revenue inspector named Butterfield, who has since left the service.

Q. I will refer to page b-8 of this report, to the printed statement in that report, and ask you to read that, please.

Mr. MAGUIRE.—Well, if the Court please, that is not evidence in this case. It would not be evidence against us.

Mr. SMITH.—I am simply asking him to read it.

Mr. MAGUIRE.—I thought you meant read it out loud.

Mr. SMITH.—No, read it to himself.

Q. Can you now tell the Court whether in the examination of the Boss & Peake Automobile Company books upon which you based this statement of



(Testimony of B. B. Weldy.)

the excess income tax in controversy, whether you had a fairly accurate record upon which to base it?

A. Oh, yes; much more than we frequently find.

Q. And from the examination of those books what records did you have access to, showing the expenses, the items that went into it, each particular car as it was received and transferred, and how did you arrive at the profit?

A. I had everything presumably in the office at my disposal; I had a little room to myself, or rather two of us, Mr. Butterfield worked with me three days, and we spent the first two days finding the documents and the books that we thought we would need; and outside of the journal, cash-book, or the combined journal and cash-book and the ledgers I can't recall the exact documents or statements or whatever they might be termed. It is impossible for me at this time to recall what I had.

COURT.—How long did it take you to make up that statement? [223—148]

A. For the Boss & Peake Automobile Company two or three days; then I had perhaps a week after that writing up the report on it.

Cross-examination.

(Questions by Mr. MAGUIRE.)

Mr. Weldy, when you made this investigation you discovered that there had been no inventory taken of the assets of the Boss & Peake Automobile Company as of June 1, 1917? A. Yes, sir.

(Testimony of B. B. Weldy.)

Q. And it was impossible therefore to prepare a profit and loss account? A. That is right.

Mr. SMITH.—Mr. Maguire, excuse me, will you let me ask him one more question, please?

Mr. MAGUIRE.—Certainly.

(Examination by Mr. SMITH.)

Q. Will you turn to page 136 of this journal, combined cash and journal, pages 135 and 136. I want to call your attention particularly to this check No. 2804 for \$4,223.91, that is marked clearing account, and on page 136 the same item appearing under the 19th as a clearing account transferred from B. & P. A. Company to C. L. B. & Company, \$4,223.91. I will ask you whether one of those items is a debit item and the other a credit.

A. They are.

Q. Which is the debit and which is the credit, Mr. Weldy?

A. The first item on page 135 is debit and on page 136 credit.

Q. From your experience in investigating corporate records and as an accountant, what is this account referring to when it says a clearing account? [224—149]

A. That is hard to tell. It is usually the dumping-ground for a number of things, to close up the books at a certain period, or in between periods; and when we find that there is a debit and a credit closing the account we very seldom go into it.

Q. In examining the books of the Boss & Peake

(Testimony of B. B. Weldy.)

Automobile Company, in what condition did you find them?

Mr. MAGUIRE.—I don't see that that would be competent.

COURT.—Do you object to that?

Mr. MAGUIRE.—Yes, your Honor, I do.

COURT.—I think he has already testified.

Mr. LOGAN.—I don't know that he has answered that question, your Honor.

COURT.—No, not that question, but I understood him to say he found them in very good form at some stage of his testimony.

Mr. LOGAN.—I don't recall that, your Honor.

A. I think I did. I think I made that statement, your Honor, yes, sir.

Cross-examination Resumed.

Q. In this matter of clearing account, Mr. Weldy, that shows that there was a check written, doesn't it? A. Yes, sir.

Q. It doesn't show what the check was written to, does it? A. No.

Q. But when you turn over the page here, that explains the transaction, doesn't it?

A. Yes, it appears so. There is more explanation of the credit than there is of the debit. [225—150.]

Q. Now, I want to ask this question: Isn't that where they had taken the money out of the bank account of Boss & Peake Automobile Company and put it over there to the bank account of C. L. Boss Automobile Company?

(Testimony of B. B. Weldy.)

A. I would not attempt to say it was. That is up to the bookkeeper.

COURT.—I want to ask a question. Why does one of those entries appear on the debit side and one on the credit side?

A. I think, your Honor, just as it states there, it is a clearing account for a number of items that have probably come up during the closing of the corporate period, corporate existence. They frequently come up, and then they issue a check to cover it or close it out in some other way. Now, the bookkeeper is the only one that can answer that. I am not competent.

Q. But when you have a clearing account that is a matter of clearing off the books, that does not involve any issuance of any checks, does it?

A. Oh, it might; it might.

Q. You didn't investigate that to trace down the history of that? A. No, I didn't.

Q. Very well, sir, I won't further examine you, then.

Excused. [226—151]

**Testimony of R. J. McRell, for Defendant.**

R. J. McRELL, called as a witness on behalf of defendant Boss, being first duly sworn, testified as follows:

**Direct Examination.**

(Questions by Mr. SMITH.)

Now, Mr. McRell, I will ask you please to speak



(Testimony of R. J. McRell.)

out plainly. Remember it is very hard to hear in this room. State your full name, please.

A. Robert John McRell.

Q. Your age? A. 39.

Q. Your occupation? A. Automobile business.

Q. How long have you been in that business?

A. I have been in the automobile business in Oregon since 1914.

Q. Were you engaged in it before you came to Oregon? A. Yes.

Q. For how long a time and where?

A. Since about 1911.

Q. In the State of Oregon with whom were you associated in the automobile business?

A. I was in business in Eugene when I first came out here myself, and later I went in business with Mr. Boss.

Q. When you say you went in business with him, in what capacity did you go in business with Mr. Boss at first?

A. The first time I was connected with Mr. Boss was as a wholesale representative of C. L. Boss & Company.

Q. Of the old company? A. Yes.

Q. What was your next association with him generally in the business?

A. Well, I continued the same with the Boss & Peake Automobile Company.

Q. And your next association, if any?

A. I became Mr. Boss' partner. [227—152]

Q. What day did you become Mr. Boss' partner?

(Testimony of R. J. McRell.)

A. On June 1, 1917.

Q. Do you know Mr. Peake? A. Yes.

Q. How long have you known him?

A. Well, I never knew Mr. Peake until he came in the business with Mr. Boss.

Q. Were you present at or did you hear any conversation between Mr. Boss and Mr. Peake about Mr. Boss forming a new partnership to take over the business?

A. Of the formation of the Boss & Peake Automobile Company?

Q. The formation of the C. L. Boss Automobile Company. - A. Yes.

Q. Did you talk with Mr. Peake personally about that?

A. I talked to Mr. Peake before we all talked together, before we all met, yes.

Q. About what time did you first talk with Mr. Peake about you and Mr. Boss forming the C. L. Boss Automobile Company?

A. Why, it was some time in April, in the spring of 1917; just the exact date I don't just recall.

Q. And from that time on, Mr. McRell, did you talk with Mr. Boss frequently about the formation of a partnership?

COURT.—Mr. Boss or Mr. Peake?

Q. Mr. Boss, first. A. Yes.

Q. Did you also talk with Mr. Peake on more than one occasion?

A. Well, in which way do you mean that?

Q. About the formation of the C. L. Boss Auto-

(Testimony of R. J. McRell.)

mobile Company taking over the business of the old corporation.

A. Well, we discussed it a time or two; not very much at length.

Q. Now, when you talked with Mr. Peake, what did you discuss, [228-153] if anything, about the new partnership? When was it, where was it, and who was present? What was the occasion?

A. Well, do you mean the first time I talked with him?

Q. Yes, the first time is all right; start with that one.

A. Well, there was not very much discussion about it. It was just merely we exchanged ideas about my going in with Mr. Peake and about how he felt—going with Mr. Boss rather, not with Mr. Peake—that we would make a good team together, and would do nicely. As to go into the details of our business, why, there was not very much gone into between Mr. Peake and I.

Q. Well, now, later on, about the latter part of May, 1917, did you have any talk with Mr. Peake about your going in with Mr. Boss?

A. Well, in the latter part of May, of course, when we met at the Union Station, when the conversation came up, when they agreed on their dissolution of the Boss & Peake Automobile Company, I was present there.

Q. You were present at that time, were you?

A. Yes.

Q. I want you to speak up plainly and tell the

(Testimony of R. J. McRell.)

court in your own way what that transaction was, what the understanding was between him and Mr. Boss.

Mr. MAGUIRE.—That he personally overheard?

Mr. SMITH.—Yes, that he personally knows.

A. Well, I was at the Union Station with Mr. Boss and Mr. McCornack, the sales-manager of the Hudson Motor Car Company, who had come here to Portland, as he frequently does, at the time that Mr. Peake came down to the Union Station. Mr. McCornack and Mr. Boss and myself were there when Mr. Peake came in; and he came up and started talking to Mr. McCornack, discussing—  
[229-154]

Mr. MAGUIRE.—Speak louder, please.

A. He started talking to Mr. McCornack at that time.

Q. He—who? Peake? A. Yes, Mr. Peake.

Q. Did you hear what he said to Mr. McCornack?

A. Yes.

Q. What was it, please?

A. Well, he started in to discuss in regard to the Hudson contract.

Q. Tell what was said, as nearly as you can.

A. He also started in discussing with Mr. Boss in regard to the way their business relations had been. And Mr. McCornack evidently was not very much—he didn't care very much about listening to their past difficulties. In other words, his attitude was such that he didn't care anything about that, and he very quickly dismissed the subject.



(Testimony of R. J. McRell.)

Q. What did he say to Mr. Peake?

A. He told Mr. Peake that he was not interested in their discussions, or words to that effect. The exact words I don't just recall. That if he started in to quarrel with anybody he would be quarreling with the Hudson Motor Car Company.

Q. If who started to quarrel?

A. If Mr. Peake started to quarrel with anybody at that time. And at that time he boarded his train, and left the city.

Q. Did you hear any talk between Mr. Peake and Mr. Boss after Mr. McCornack left the city?

A. Yes.

Q. Where was that?      A. At the Union Station.

Q. Same place?      A. Yes.

Q. What was that conversation, please?

A. The conversation was, that Mr. Boss turned to Mr. Peake [230-155] and said that he was blocking the dissolution of the Boss & Peake Automobile Company, and Mr. Peake asked him how that was. And he said that he had taken the money of the corporation and had put it into automobile notes; in other words, had used up the funds.

Q. Who said that?

A. Mr. Boss said to Mr. Peake.

Q. That he, Peake, had taken the money?

A. Yes. And Mr. Peake came back at him very quickly, and said that he would take the notes of the C. L. Boss Automobile Company, that is, he would loan money to the C. L. Boss Automobile Company, and take the new automobiles that was

(Testimony of R. J. McRell.)

controlled by the Boss & Peake Automobile Company.

COURT.—Take them as security?

A. As security for the loan; as I recall there were 8 automobiles—these 8 Hudson automobiles to apply on this loan. And he said that he must have his salary in the deal, and he must have his capital, and he must have his profit.

Q. At that time, did they figure up or discuss what the profits would be?

A. They estimated, as I recall, their profits at \$20,000; and the division of the two, of course, would be \$10,000, divided between the two; that would be the division of the profits.

Q. That was Peake's proposition to Boss?

A. Yes.

Q. Do you know whether that was afterwards acted upon? A. How is that?

Q. Do you know whether Mr. Boss accepted that?

A. Very quickly, right there.

Q. And did you have anything to do with winding up the affair between them? [231—156]

A. No, I had nothing to do with the Boss & Peake Automobile Company.

Q. What time of day was that conversation?

A. It was in the morning. The exact time, it seems to me it was something like around nine o'clock, or something like that; before the train left, anyway.

Q. Of what date, please?

(Testimony of R. J. McRell.)

A. Why, I think it was either on the 21st or 22d of May. Something like that.

Q. After that when did your C. L. Boss Automobile Company actually engage in the automobile business? A. On June 1, 1917.

Q. What did you do on June 1, 1917, about taking charge of the business?

A. Well, on the morning of June, 1917, we met Mr. Peake down at the First National Bank.

Mr. LOGAN.—You mean June 1st, do you not?

A. Yes, June 1st. And there the deal was completed.

Q. What do you mean by the deal being completed, what transpired?

A. Well, the deal was completed according to their agreement that they had down at the Union Station.

Q. What was done, what did they do in carrying it out?

A. Well, Mr. Boss had hustled out and borrowed money on his property to help to make up the amount that he was to pay Mr. Peake, and then Mr. Peake loaned the \$9,600, that was \$8,000, as I recall, that Mr. Boss borrowed, and there was \$9,600 that Mr. Peake loaned the partnership. And then there was some amount taken out of the treasury of the Boss & Peake Automobile Company; I don't remember the figures on it. But anyway they made up the amount between them, which [232—157] came to something—\$26,000, or a little better.

Q. Did they leave the place of business together

(Testimony of R. J. McRell.)

—Boss & Peake go to the bank together, or do you know?

A. I don't know. I don't think they did. I don't believe they did.

Q. Anyway, what did you do on June 1, 1917?

A. Well, from the bank we went down to Mr. Logan's office and there Mr. Logan attended to the details, that is, filing the assumed name of the copartnership.

Q. That is this document here, marked Boss' Exhibit "B"? That is your signature to it, is it?

A. Yes, sir.

Q. And when did you take actual charge of the business, you and Mr. Boss?

A. On June 1, 1917.

Q. Since that time has Mr. Peake had anything whatsoever to do with the business at that place?

A. Absolutely nothing.

Q. Where did you run the business of your partnership?

A. Same place—615-617 Washington St.

Q. Do you know whether the corporation itself ever did any further automobile business at that place after June 1st? A. No, it was dissolved.

Q. What firm has transacted the automobile business at that place since that time?

A. C. L. Boss Automobile Company.

Q. Now, you have spoken of some conversation with Mr. Boss, as I recall it, about April, concerning your going in with Mr. Boss.

A. Yes. [233—158]



(Testimony of R. J. McRell.)

Q. Prior to the time that you had any talk with Mr. Boss about going in with him, did you have any talk with Mr. Peake in which Peake tried to get you to go in with him?     A. Yes.

Mr. MAGUIRE.—Objected to. That is obviously leading.

Q. When was that conversation, and where was it, and who was present?

A. As I recall, the conversation that I had with Mr. Peake at that time was in March, I believe, along about the middle of March, I would say from the middle to the latter part. I went to lunch with Mr. Peake, and at that time he was talking to me about going in or taking stock in a corporation to be formed at the dissolution of the other corporation to enter in to the automobile business. At that time he was going to get the Hudson contract, that is the Hudson and Maxwell contract, or use his efforts to get them.

COURT.—How does that affect this case?

Mr. SMITH.—Simply as showing the attitude of Mr. Peake toward Mr. Boss at that time; that was all.

Q. Were those the cars that the Boss & Peake Automobile Company had been handling?

A. Yes.

Cross-examination.

(Questions by Mr. REILLY.)

Mr. McRell, the corporation about which Mr. Peake asked you concerning the taking of the

(Testimony of R. J. McRell.)

stock, wasn't that the Boss & Peake Automobile Company?

A. No. He never said a word about the Boss & Peake Automobile Company.

Q. He was going to dissolve that—under your understanding [234—159] he was going to dissolve that corporation so he could form another corporation?

A. That was the impression I got, if he were able to get the contract; that is, he was discussing doing that.

Q. Mr. Boss also talked to you from time to time about taking stock in the Boss & Peake Automobile Company, didn't he?

A. Never has been a word ever offered from either side to me to take any stock in the Boss & Peake Automobile Company; never has been by anybody.

Q. How about the corporation that was to be formed after the Boss & Peake Automobile Company was dissolved? Did Mr. Boss ever ask you to take any stock in that?

A. There was no corporation to be formed that Mr. Boss ever discussed with me after the Boss & Peake Automobile Company was dissolved.

Q. I am not asking you after the Boss & Peake Automobile Company was dissolved. I am asking you about the period before that. Wasn't there any discussion at any time between Mr. Boss and yourself about forming a corporation?

A. No, sir.

(Testimony of R. J. McRell.)

Q. Didn't you know that Mr. Boss endeavored to peddle stock in that corporation around among several of the employees?

A. Not to my knowledge; he never offered to peddle any to me.

Q. Now, coming down to this conversation at the depot, Mr. McRell, you stated that Mr. Peake said he must have his salary, his capital, and his profit, which he estimated as half of \$20,000?

A. Yes.

Q. Now, just what were the words that Mr. Peake used, as far as you can remember them?

A. Well, as far as I can remember them, that is about as he said. [235—160]

Q. Put it in the first person. That will make it clearer. In other words, put yourself in his place. Use the first person, and see what you get.

A. I will do the best I can. He said—

Q. Put it in the first person.

A. He says, "I will do this" or "I must have my salary"—I supposed he had always got a salary; maybe he had, I don't know—"I must have my capital, and I must have my profits, which I estimate to be \$20,000, or approximately that," as I remember it. Of course, my not being any more than a hired man I didn't pay very much attention to it, because I was not interested in it.

Q. Now, as a matter of fact, didn't that conversation take place at a distance of 40 or 50 feet away from you, and before Mr. McCornack had left? A. No, it did not.

(Testimony of R. J. McRell.)

COURT.—In this transaction was there any transfer of capital stock by Mr. Peake to Mr. Boss? A. No, sir.

Q. In the transaction, wasn't the capital stock indorsed by Mr. Peake and handed to Mr. Boss?

A. They were discussing how they would do it.

Q. Answer my question, yes or no.

A. How is that again?

Q. Answer the question I am asking you. In this transaction wasn't the capital stock owned by Mr. Peake indorsed in blank by him at Mr. Boss' request, and delivered to Mr. Boss?

A. Why, at the bank Mr. Peake indorsed his stock.

Q. And delivered it to Mr. Boss?

A. Where he delivered it I don't know. [236—161]

Q. Didn't you see what became of that stock?

A. No, I don't know as I did. That was a transaction between those people. I had nothing to do with that.

Q. One share was indorsed to you, was it not?

A. Not at that time.

Mr. LOGAN.—You started to make an explanation. If you desire to make an explanation you may do so, if it is pertinent to your answer.

Mr. REILLY.—Explanation of what? All right. Any explanation you want to make.

A. I don't know as it is necessary. I didn't have anything to do with it.

Q. Who was W. H. Bietau?



(Testimony of R. J. McRell.)

A. Why, W. H. was a lady, I guess, that owned a share of Mr. Peake's stock, I think. I don't know.

Q. Well, that share of her stock was transferred to you, was it not?

A. Yes; as means to an end to their dissolution.

Q. Irrespective of the purpose of it, her share of stock was actually indorsed over to you?

A. I guess it must have been.

Q. Well, don't you know that it was?

A. Yes, sir.

Mr. REILLY.—We will offer this stock certificate in evidence.

(Marked Peake's Exhibit "G.")

Q. That certificate is for one share, is it not?

A. Yes; but you don't mean it was endorsed over to me at that time. It wasn't indorsed to me at that time; as the question was, it was not indorsed over to me at the bank.

Q. I don't know anything about when you got the instrument. [237—162] The instrument speaks for itself, and has the indorsement as of May 31st. Now, the stock of Mr. E. W. A. Peake, amounting to 149 shares, this is the stock certificate for it, is it not?

A. I suppose it is. I never saw it.

Q. Didn't you see that and know that that at the time was indorsed to Mr. Boss by Mr. Peake?

A. I saw them transacting their own business at the bank.

(Testimony of R. J. McReil.)

Mr. LOGAN.—We will agree that all of the shares may be introduced in evidence.

Mr. REILLY.—We offer this certificate in evidence.

COURT.—You admit it?

Mr. LOGAN.—Yes, admitted with no objection. (Marked Peake's Exhibit "H.")

Mr. REILLY.—These other two are unindorsed. They are Mr. Boss' certificate and Mr. Murphy's which was indorsed in blank and held by Mr. Boss. I don't know that any particular purpose comes from loading up the record with them, your Honor.

Mr. LOGAN.—We brought it up here in response to your request.

Q. Now, you qualified as a director in that corporation, did you not?

A. I was put in at the dissolution as a—just merely for the closing out of the corporation under Mr. Logan's advice at that time, but I had nothing whatsoever to do with it in any way.

Q. You were made secretary of the corporation?

A. At the closing out, as a means to an end of closing out their corporation.

Q. As secretary you received from Mr. E. W. A. Peake his resignation as secretary and treasurer and director of the corporation, [238—163] dated May 31, 1917, did you not?

A. Why, at the time they were closing out the corporation down at Mr. Logan's office, at the time they voted me in just as a means to an end of the

(Testimony of R. J. McRell.)

closing or the dissolution of it, and I signed up some papers and stuff there and I paid no attention to that, what they were.

Q. Well, you have not answered my question.

A. As to what they were?

Q. That has not anything to do with the question asked you, did you or did you not?

A. I never saw Mr. Peake's resignation.

Q. Did you make up this book?      A. No.

Q. Any part of it?      A. No.

Q. Who did?

A. I suppose it was made up down in Mr. Logan's office, or Boss & Peake made it up. I don't know. I had nothing to do with the corporation.

Q. Did you sign this call for a special meeting of the directors, which call is dated June 14, 1917?

A. I signed a lot of stuff down there when they closed it out, and sure that is my signature, I must have.

Q. You signed this?      A. Yes.

Q. You didn't read it?

A. No. I was voted in and at the time I asked Mr. Logan if it involved me in any way, and he said no, that it was just a means to an end at the dissolution, and under his advice I did that; and I paid absolutely no attention to it, because I had nothing to do with it.

Q. Did you sign this waiver of notice of a special meeting of the stockholders to be held on May 31, 1917, at the office [239—164] of the company? Did you sign that?

(Testimony of R. J. McRell.)

A. My signature—that was all signed at the same time Mr. Boss, Mr. Murphy and myself signed the whole bunch of them down there when they dissolved.

Q. Did you read that when you signed it?

A. No.

Q. You signed a statement headed “We, the undersigned being all the stockholders of the corporation of Boss & Peake Automobile Company—”

A. At the advice of Mr. Logan, I signed it. \*

Q. Is that Mr. Boss’ signature?

A. Yes; and also Mr. Murphy’s signature.

Q. Also Mr. Murphy’s signature? A. Yes.

Q. And your signature? A. Yes.

Q. Are these the signatures of Messrs. Boss, Murphy and yourself on the minutes of the meeting of May 31st?

A. That is the same time. It was all signed at the same time. We had a whole stack of them; and we jollied ourselves about our practice in penmanship in closing out the Boss & Peake Automobile Company. As to what I signed I don’t know, because it was all done there at one time.

Q. You signed the minutes of the meeting of the board of directors held on the first day of June, 1917, at the office of the company?

A. They were all signed at the same time; that is another one of them.

Q. Well, were these meetings held?

A. They were when they were dissolved, they were dissolving.



(Testimony of R. J. McRell.)

Q. Did you hold this meeting that you signed up here as having held? Did you hold that meeting on May 31, 1917? A. Gosh, I don't know.

Q. Did you hold this meeting which you have signed here? [240—165]

A. If it says so, we must have, because it was all up to Mr. Logan that handled those affairs. Now, what he did I don't know. I have got confidence in what he says, and what he tells me, and that is all there is to it.

Q. At that meeting of the board of directors, June 1, 1917, were you elected a director and secretary and treasurer of the corporation?

A. I was elected something with the understanding it was just a means to the end of the dissolution.

Q. But you actually were elected at a meeting on the first day of June, 1917, is that true?

A. I suppose I was.

Q. Did you sign this bill of sale from the corporation to the partnership referred to in the meeting of the stockholders of June 22, 1917?

A. Yes, sir; with the same understanding as all the rest.

Q. Did you read this?

A. No, sir; just a means to the end of the dissolution, why should I read it? I heard their understanding and their deal.

Q. Did you read this certificate, this assumed name certificate?

A. Oh, yes, sir. Yes, that is our own business.

(Testimony of R. J. McRell.)

Q. Oh, you read that?

A. I began to look at that, yes, sir.

Q. That is the only thing you did look at?

A. Why, sure.

Q. You didn't look at this assignment of the assets of the Boss & Peake Automobile Company to the partnership? A. Which?

Q. The assignment—bill of sale or assignment?

A. No. [241—166]

Q. Of the assets that you signed on behalf of the corporation?

A. That is part of the Boss & Peake corporation business that I had nothing to do with.

COURT.—You were acting as director there and secretary?

A. Just at the closing of it out. I was acting under Mr. Logan's advice.

COURT.—I know you were. You were interested to that extent as director and secretary, weren't you?

A. Yes, but as I was saying, that I was informed before I was put in that it was just carrying out of their own deal of a dissolution that they had agreed to; and naturally in a dissolution, as I understand it, which I don't know much about—

COURT.—As those papers were prepared and presented to you for your signature, were you informed what they contained?

A. Oh, yes. I was informed what they contained, yes.

(Testimony of R. J. McReil.)

COURT.—And you signed them with your eyes open?     A. Yes.

COURT.—That is all right. Go ahead.

Adjourned until 10 A. M.

Portland, Oregon, May 24, 1922.

R. J. McREIL resumes the stand.

Mr. REILLY.—If the Court please, your Honor will remember that the defendant Peake demanded the production of the bank-book of the Boss & Peake Automobile Company. The book which we asked for is the bank-book.

Mr. SMITH.—The bank deposit-book—pass-book?

Mr. REILLY.—Yes. Now, that we have this check-book, we will offer, if the Court please, in evidence a check made by [242—167] Boss & Peake Automobile Company by C. L. Boss, President, payable to the order of C. L. Boss, the amount being \$8,537.15, indorsed C. L. Boss, Charles L. Boss, cleared through the First National Bank. The check is dated June 1st, and cleared June 2d.

Mr. LOGAN.—It is stipulated that this check covers the same amount as noted in Boss' Exhibit "C," which contains the items \$9600, \$8000, \$8537.15, which is the exact amount of this check just introduced.

(Marked Peake's Exhibit "I.")

Mr. REILLY.—We will also offer in evidence the stub in this book of check stubs, evidently a check-book relating to check No. 2804, dated June

(Testimony of R. J. McRell.)

19, 1917, showing the check of \$4,223.91, payable to the order of C. L. Boss A. Company.

(No objection.)

(Marked Peake's Exhibit "J.")

Mr. MAGUIRE.—May it be stipulated that the check there mentioned is the same check which is found in the combined cash-book journal, pages 135 and 136?

Mr. SMITH.—Yes.

Mr. MAGUIRE.—May it be further stipulated that that check was a check of the Boss & Peake Automobile Company?

Mr. SMITH.—I think it is also the stub of a check—well, I don't know as to that.

Mr. LOGAN.—This is the check-book of the Boss & Peake Automobile Company. It needs some explanation, however.

Mr. REILLY.—No objection to your explaining it.

Mr. MAGUIRE.—Can we stipulate upon this further fact that the bank account of the C. L. Boss Automobile Company was not opened until June 19, 1917? [243—168]

Mr. SMITH.—Yes. Will you stipulate the fact that from June 1, 1917, until June 17th or 19th, 1917, when the C. L. Boss Automobile Company account opened at the bank, the new partnership, C. L. Boss Automobile Company, used this bank account to transact its business through?

Mr. MAGUIRE.—No, I won't. I understand that C. L. Boss Automobile Company had no bank



(Testimony of R. J. McRell.)

account whatever, of its own, up to June 17, 1917.

Mr. REILLY.—Without explanation do you admit, to keep us from proving it,—I was just arranging to subpoena the bank officer—do you admit that the C. L. Boss Automobile Company had no account of its own in any bank prior to June 19, 1917?

Mr. LOGAN.—We have already admitted that; but your other question is an entirely different proposition. We did business, however.

Mr. REILLY.—I didn't ask you about that.

Mr. LOGAN.—You did; that was your question.

#### Redirect Examination.

(Questions by Mr. SMITH.)

On yesterday, Mr. McRell, some matter was brought to the Court's attention about the minutes of this corporation in its dissolution; the various documents that you signed. Do you know relatively about what time you got the one share of stock of the Boss & Peake Automobile Company?

A. It was on about the first of June.

Q. And who gave it to you? Who delivered it to you personally?

A. Well, I don't remember who delivered it to me.

Q. Well, now, after that, in signing these papers for dissolution, you understood the contents of each paper, didn't you? [244—169]

A. Oh, yes.

Q. It was fully explained to you what you were doing?

(Testimony of R. J. McRell.)

A. It was fully discussed in the presence of everybody, yes, sir.

Q. And why was it that you went in as an apparent stockholder of the Boss & Peake Automobile Company?

Mr. REILLY.—Objected to as calling for the conclusion of the witness, purely argumentative. The facts speak for themselves.

COURT.—He may answer the question.

A. Why, I was voted in as a stockholder for the means to an end to liquidate the Boss & Peake Automobile Company. That was my understanding of why it was transferred.

Mr. SMITH.—I would like to introduce the file your Honor has on the desk. The gentlemen have introduced a certain number. With their permission we will introduce the certificate of dissolution.

(Marked Boss' Exhibit "G.")

Mr. REILLY.—It is not in there. I wanted to offer that, but I didn't find it if it is.

COURT.—Isn't that admitted in the pleadings?

Mr. SMITH.—Yes, it is admitted.

COURT.—Very well, then, the certificate is not in issue.

Mr. REILLY.—Yes. I don't know the date of it.

COURT.—I was looking at the pleadings just now. I thought I noticed it.

Mr. REILLY.—The dissolution is admitted. They have alleged in their complaint in some of

(Testimony of R. J. McRell.)

their affidavits that the dissolution occurred on June 1st, and the date of the instrument itself is important, if we have it, your Honor. It was somewhere around, [245—170] I think, I don't know, somewhere the end of June.

COURT.—About the 22d.

Mr. REILLY.—That was the date of the stockholders' meeting, but I think the dissolution certificate was later. It was July 17th, I believe.

Mr. LOGAN.—Here it is. It was sent to Salem, and finally came back on July 17th.

COURT.—You are introducing that, are you?

Mr. LOGAN.—The gentleman stipulated. However, we may introduce it for the purpose of the record.

(Marked Boss' Exhibit "G.")

Recross-examination.

(Questions by Mr. REILLY.)

Just one question, Mr. McRell. If you took this share of stock solely for the purpose of assisting in dissolving, why did you take part of the assets of the Boss & Peake Automobile Company, part of the surplus account?

A. Part of the surplus account?

Q. Part of the surplus account, yes.

Mr. SMITH.—When do you claim he took that, Mr. Reilly?

COURT.—Permit him to answer the question, then you can inquire.

A. I don't know which account you refer to.

Q. Don't you remember that you took part of

(Testimony of R. J. McRell.)

the surplus account of the Boss & Peake Automobile Company.

A. I remember, if it is the account you refer to; the amount that was set aside by the Boss & Peake Company to take care of their adjustments of notes and stuff like that.

Q. You know, Mr. McRell, that the income of that corporation for the five months ending May 31st was \$22,500 after the [246—171] salaries were paid, don't you?

A. That is what the book says. That is what was brought out here, yes.

Q. And a tax, part of a tax has been paid by Mr. Boss on that basis?

A. Yes, Mr. Boss paid his part, yes.

Q. Mr. Peake got only \$10,000 in addition to the par value of his stock plus his salary that is not included in that sum, didn't he?

A. That is what he asked for, yes.

Q. Yes. And out of the remaining \$2250 you took a part of that, didn't you, and it went to your personal account, and you were given personal credit by that part of the profits? Isn't that true?

A. It was put in after the account had run for something like a month or something like that, to see what the amount of their adjustments or their debts, as you might say, might be, or bills, or whatever adjustment accounts. And then it was put in to clear itself out through our account.



(Testimony of R. J. McRell.)

Q. But you took credit for it in your personal account, didn't you?

A. Well, I don't know how it is on our books. It has been so long since I saw it, I never thought of it again.

Q. Let me call your attention to your personal account in the ledger.

A. Yes. \$377.11, surplus account.

Q. Did you or did you not take part of the profits? A. Yes, it is on my account.

Mr. REILLY.—One other question I wanted to ask this witness, if the Court please. [247—172]

Q. Now, Mr. McRell, when you made this affidavit concerning this stock transaction, whatever it was, when you made the affidavit to the tax collector, did you know of the facts which you put into that affidavit?

Mr. SMITH.—Objected to unless he is shown the affidavit, given a chance to refresh his memory from it.

Q. I am not asking about any item.

COURT.—He ought to know whether he did know those facts or not.

A. If I made an affidavit I certainly would know the facts. I don't remember them now, because it has been so long ago.

Q. Well, your affidavit, according to this exhibit, was made on the 23d day of August, 1920.

A. Yes.

Q. Was it made after an investigation of the facts? A. Yes.

(Testimony of R. J. McRell.)

Q. And your books at that time showed that the Boss & Peake Automobile Company's account was, assets were at least equal to \$30,000 plus this \$22,540 odd dollars profit earned in the first five months of 1917, plus the \$604 profit earned in December, 1916, did it not?

(Objected to as incompetent.)

A. I never paid any attention to the Boss & Peake books.

Q. You didn't? A. No, sir.

Q. Well, then, what did you mean by making an affidavit that Mr. E. W. A. Peake—and I will show it to you—received in settlement \$26,137.15, which was one half of the value of said assets, as above set out, together with the value of a certain desk.

A. Because that was their agreement, and I saw him get it at the bank. [248—173]

Q. Why did you make an affidavit that that was one half of the assets of that corporation, if you didn't look into the books?

A. Well, because taht is what it foots up to.

Q. Then you did look into the books?

A. Yes, I saw their balances, yes, but not to go all over it.

Q. Let me give you this profit and loss account. That profit and loss account before the payment of these sums to Peake and Boss and the surplus account which eventually went to you and Boss shows \$26,746.64, does it not? A. Yes, sir.

Q. And the salaries have been already taken out,

(Testimony of R. J. McRell.)

and that amount is over and above salaries, isn't it?

A. Yes, I believe it is.

Q. Well, you know it is. If there is any doubt you can check over general expenses. You know it is, don't you? A. Yes.

Q. All right. The capital of that corporation was not impaired, was it?

Mr. SMITH.—Objected to as incompetent. That is for this Court to conclude.

COURT.—I will overrule the objection.

A. Would you ask the question again?

Q. The capital was still intact?

A. You mean on the first day of June?

Q. I mean prior to the time this transaction took place. I am not trying to trap you into anything whatever. A. Yes, I think it was.

Q. So that at the time this transaction took place, the assets of this corporation were at least \$30,000 plus \$26,746, were they not? [249—174]

A. Yes.

Q. After the salaries had been paid, is that true?

A. Yes.

COURT.—He has answered that.

Mr. REILLY.—I wanted to be sure he understood it fully, your Honor.

Q. Now, if that is true; if the assets of that corporation were at least \$52,746.64 after the salaries had been paid, how do you explain your affidavit that Mr. Peake in receiving \$26,137.15, which included his salary, received half of the assets of the corporation?

(Testimony of R. J. McRell.)

A. Well, he received that less this adjustment account.

Q. Did you say anything about any adjustment account in your affidavit?

A. Well, I don't know.

Q. Well, read it.

A. I don't remember anything about this. It has been too long.

COURT.—Well, it is a fact, is it? It does or does not say so.

Mr. REILLY.—No; there is nothing in there about it. I will not require you to explain, but it speaks for itself.

Redirect Examination.

(Questions by Mr. SMITH.)

You said something about less the adjustment account, Mr. McRell. What did you mean by that expression?

A. Well, I meant that in their agreement at the station where Mr. Peake was to receive his profit and his capital and his—to make up his \$26,000, there was a balance set aside by them in their own transaction of something like \$2200 or something,—[250—175] I don't just remember the exact amount, to take care of what might be done. As to the bookkeeping part, I never paid any attention to that, because it was not my part of the business, never has been, and isn't to-day.

Q. Before you made the affidavit and while you were there, did you examine this page?



(Testimony of R. J. McRell.)

Mr. REILLY.—Object to his being coached what he examined. Let the witness say for himself what he examined, if the Court please.

COURT.—He may call his attention to it.

A. Yes.

Q. 159 and 159-a and 159-b of this—is that the journal or ledger? A. That is the journal.

Mr. SMITH.—The pages I have just called his attention to are the pages that we were over so thoroughly with Mr. Boss I thought no further question could arise with this.

Q. I will show you the combined cash and journal at page 120. Had you also seen that sheet?

A. Yes.

Q. And based upon all of them, you made the affidavit, did you? A. Yes.

Q. Having in mind this adjustment account?

A. Yes.

Q. Now, do you know how and when the credit to your individual account that was shown you arose, the little credit relating to some distribution of assets of the former Boss & Peake Automobile Company? A. Do you mean the date?

Q. Yes. Do you know about when it was? [251—176]

A. No, I don't remember the date.

Q. Can you turn to your account here, please, and find it. A. On June 30th.

Q. June 30th of what year? A. 1917.

Q. How did that credit arise?

A. Well, to eliminate a lot of bookkeeping and

(Testimony of R. J. McRell.)

keeping separate accounts. We tried it out for one month, and averaged what their adjustments were, and to save carrying an additional account it was all thrown in and let wear itself out or take care of itself in time.

Q. You had only one share of stock? A. Yes.

Q. You spoke of the entire aggregate assets of the Boss & Peake Automobile Company as being \$52,746.64. Can you give us three or four items that will make that sum up? How was it made up?

COURT.—I think you have been over that. It is taking up time.

Mr. SMITH.—Very well, if the court understands it. That is all. That is our case.

Excused. [252—177]

### **Testimony of E. W. A. Peake, in His Own Behalf.**

E. W. A. PEAKE, called as a witness on his own behalf, being first duly sworn, testified as follows:

#### **Direct Examination.**

(Questions by Mr. REILLY.)

You are one of the defendants in this case, Mr. Peake? A. Yes, sir.

Q. When was the first word you heard about this tax?

A. Well, I forget the date. It was that letter that you have spoken of in the testimony, received from Mr. Boss.

Q. That letter received in August, 1920?

A. Yes.

(Testimony of E. W. A. Peake.)

Q. Had you received any prior communication from Mr. Boss or anyone else on the subject?

A. No.

Q. Now, when you received this envelope addressed to you and containing this notice and demand for tax, addressed to the Boss & Peake Automobile Company, some number on Washington Street, did you and I wait upon Mr. Walker in the Collector's office? A. Yes, sir.

Q. What, if anything, was said in that conversation about the return made by the Boss & Peake Automobile Company, and the basis of this tax?

A. Well, as I remember it, Mr. Walker explained that Mr. Logan and Mr. Boss had made certain representations which had induced him to divide that tax. [253-178]

Q. Was any one present besides yourself and Mr. Walker and myself? A. No.

Mr. SMITH.—Object to any further testimony of the conversation, if the Court please.

COURT.—Mr. Walker has been on the stand.

Mr. REILLY.—This is not impeachment, your Honor. The question I am leading up to is to disclose that Mr. Walker was asked whether he had given permission or whether he had refused to permit us to examine the return of the Boss & Peake Automobile Company. He admitted he had, as I recall it. Then he was asked whether or not he had made a demand and he said he had sent these letters. And he denied remembering whether we had asked him particularly to make a demand on

(Testimony of E. W. A. Peake.)

us so that if we paid we would not be doing a voluntary act and have no rights. And I am merely asking the witness leading up to that to show that he refused to do so.

COURT.—Oh, very well. You may ask that. That was what I supposed you were trying to get at.

Mr. REILLY.—Yes, your Honor.

Q. Leaving out, then, the question of the examination of the return, I don't care so much about that, was anything said about the Government making a demand upon you to pay the tax? Was any request made by you or myself in your behalf, at that time, in conversation with Mr. Walker?

A. We asked Mr. Walker to see the returns, which he agreed to give us, and then came back and asked me if I were a stockholder of the concern, and I said no. Then he says, "I can't show you the returns." [254-179]

Q. Well, was anything said about the Government making a demand on you instead of sending you a demand on the Boss & Peake Automobile Company?

A. Well, I don't know. My memory is not clear on that. I know there was a conversation, but what it was I don't exactly know.

Q. I think maybe we can save time by starting apparently in the middle of this. When was the first question discussed between you and Mr. Boss relative to either of you disposing of his stock or in any other way getting out of the company?

A. That was on about the time that Mr. Boss



(Testimony of E. W. A. Peake.)

made that proposition in writing to get control of the stock.

Q. And you are referring, when you say that, to Peake's Exhibit "A"?

A. Yes. It was about that time. That was about the 26th day of March; probably a few days before that.

Q. Did you at that time offer to sell to Mr. Boss on an inventory basis?

A. Not on an inventory basis, no.

Q. Was that instrument drawn in its terms according to your request, or otherwise?

A. No, that was a suggestion of Mr. Boss'.

Q. And did you have any conversation respecting the way in which you would sell out, if you ever sold out, with Mr. Boss      A. Yes.

Q. When?      A. At that time.

Q. And what was that conversation?

A. That I would sell my stock in the company.

Q. Did you have any conversation relative to whether any sale that you would have would have anything to do with an inventory basis? [255-180]

A. No. I was always opposed to any inventorying that stock. I always expected to sell for a lump sum.

Q. Now, how were matters getting on at the office between you and Mr. Boss in the management of the business?

A. Well, they were rather strained.

Q. And how about this visit of Mr. McCornack? How did you come to go to the depot?

(Testimony of E. W. A. Peake.)

A. Well, I was informed that Mr. McRell and Mr. Boss had had Mr. McCornack in town for a day or so. And they had him at the hotel; they were with him at the hotel. And I telephoned the hotel, and they said he had checked out and had gone to the station. So I went down there and found them standing just prior to the time Mr. McCornack left—a few minutes.

Q. Then what happened when you got there? Just tell the Court in your own way just what happened.

A. Well, the atmosphere was very chilly. Mr. McCornack while I had only seen him once before in my life was civil and that was about all. He said he understood that I had been trying to give Mr. Boss the worst of it to that extent. And I told him I had no such intention. There was very little said. There was very little time to speak of anything. I could see that the man was thoroughly opposed to me, and I had no chance with him whatever, so I dropped out of it. And I am not sure then whether it was after Mr. McCornack's departure or before that I called Mr. Boss off to one side. My impression is that it was before. And I asked Mr. Boss—

Q. Just a moment. When you say you called him off to one side, do you mean you called him away from Mr. McCornack and Mr. McRell both?

A. Absolutely; so we could talk privately, as no person else [256-181] was interested in our business.

(Testimony of E. W. A. Peake.)

Q. All right. What was the conversation?

A. I asked—Mr. Boss' intention was to make me a proposition to go out on July 1st; and I asked Mr. Boss if he would be able to get his money together by June 1st. He said he would. Well, I says, "I will make you a price then. I will make you a price of \$25,000 for the stock," and I would expect the salary credit to be paid. Mr. Boss says, "that is perfectly satisfactory," and we left at that, and that was all the conversation, and it didn't take any longer than I have taken in telling you now.

Q. Was anything said in that conversation about any adjustment account?

A. Absolutely nothing said about any adjustments of any kind.

Q. Was it considered in that conversation or at any time, any such adjustment account as has been mentioned here?

A. The first I heard of an adjustment account was here.

COURT.—Where?

A. In the courtroom here.

Q. Prior to this transaction at the station, Mr. Peake, had you consulted with any attorney respecting the manner in which you should dispose of your stock, if you disposed of it?

A. Yes, I had consulted with Mr. Maguire.

Q. You had consulted with Mr. Maguire. And what was the nature of that consultation?

A. Well, I asked him if there would be any—

(Testimony of E. W. A. Peake.)

Mr. LOGAN.—Wait a moment. A consultation between him and his attorney is self-serving.

Mr. REILLY.—I think it is a matter that was made at the time when there was no thought of this tax, and if the testimony is that he went to his attorney and his attorney explained to [257-182] him that a certain method was the proper method for him to adopt, and he did adopt it, I think it is proof, in other words, of the transaction that the witness went into.

COURT.—Were you advised as to how you should dispose of your interest there?

A. Yes, I was advised by Mr. Maguire how to dispose of that.

COURT.—What was the advice?

A. I asked Mr. Maguire if I transferred my stock if I would be liable. He asked me if it was fully paid for. I told him it was. He asked me if I had indorsed or guaranteed any of the debts of the company. I told him no. He said, "Then all you will need to do is to transfer your stock and have Mr. Boss take the stock over," transfer it to himself.

COURT.—That was the method you had in mind of disposing of your interest?

A. That was the method I had in mind of disposing of my interest.

Mr. LOGAN.—We withheld testimony of an attorney on our side. If this goes in, we would like to put in evidence, as to the closing of this corpo-



ration, on the advice Mr. Boss received from his attorney.

COURT.—You may do that.

Mr. MAGUIRE.—There will be no objection.

COURT.—This question is simmering down to the sole question as to how the interest of Mr. Peake was disposed of, whether it was for taking the stock and a settlement on that basis, or whether it was a direct sale of Mr. Peake's stock to Mr. Boss.

Mr. HUMPHREYS.—That is not the Government's position. The Government's position is this: The Government taxes income on a corporation. Wherever we find income we can impose a tax on it. [258—183]

Mr. REILLY.—That is not your complaint.

COURT.—That is another question.

Mr. HUMPHREYS.—Yes, it is. The question, as the Government contends, here to determine whether or not judgment shall go against Mr. Peake, is whether or not Mr. Peake in this transaction got assets out of the corporation. Whether it was a sale of stock to Boss or in distribution and dissolution, is immaterial. This is equity.

COURT.—There are two angles to this question, one is that of the Government against Boss & Peake corporation and against the stockholders of that corporation, that is the angle of the Government.

Mr. HUMPHREYS.—That is all I am interested in, of course.

COURT.—The angle of the other side is, as to the disposition by Peake of his interest in the corporation, whether it was a disposition of the stock or whether it was a settlement according to the assets.

Mr. HUMPHREYS.—Of course I am only interested in the Government's claim as against the individuals. I am not interested in the controversy between the parties.

COURT.—Mr. Peake might be liable to the Government; at the same time, between Boss and himself he might be otherwise liable.

Mr. MAGUIRE.—I take it those matters will be elaborated on the argument.

Mr. HUMPHREYS.—I wanted to make clear the position of the Government.

Mr. LOGAN.—We take the same position as the Government does. It doesn't make any difference on the facts of this case, as will develop on cross-examination of this gentleman. If the [259—184] assets of this corporation went to Mr. Peake whether he sold the stock or whether he was dividing the assets, he is responsible.

COURT.—Suppose Mr. Peake had sold his stock to Mr. Boss and this corporation had run on for six months, there would not be any question.

Mr. LOGAN.—If the corporation had gone on for any appreciable length of time.

COURT.—It did go on for a day at least; for several days.

Mr. LOGAN.—Yes. But the tax was not in ex-

(Testimony of E. W. A. Peake.)

istence at that time, and they could not have the matter in contemplation.

COURT.—I am not indicating my impression now. I am only stating the issue to get counsel to conform themselves to the issues, so the court can be better advised.

Mr. LOGAN.—I want to correct myself for a moment. It didn't go on for a day even, as a corporation. There was a check signed the next day.

COURT.—That is the question in the case. I know your position about it.

(It might be admitted that both parties had advice in this case from counsel; that they were acting on advice, as far as that is concerned.)

Mr. REILLY.—I don't believe we would admit, your Honor, that prior to this transaction Mr. Boss had any advice from Mr. Logan that what he was doing with Mr. Peake would constitute dissolution.

COURT.—It is only getting at the minds of the individuals when they were transacting the business.

Mr. SMITH.—You want to see if the minds met.

Mr. LOGAN.—Mr. Logan was in the matter from March. [260—185]

Mr. REILLY.—He didn't give that advice.

Q. Now, in that conversation was there anything said as to how the money was to be raised that should be paid to you?

A. No, nothing that day at all.

(Testimony of E. W. A. Peake.)

Q. That was May 21st, wasn't it, Mr. Peake?

A. I don't remember the exact date. I am taking your dates for it.

Q. When was the transaction actually completed?

A. Well, it was either on the first day of June or the last day of May.

Q. And in that transaction, what did you get?  
[261—186]

A. Well, I got a check from Mr. Boss for the full amount that was agreed on.

COURT.—What was that?

A. A twenty-six thousand dollar check.

Q. What did the check comprise? In other words, what item went to make up that amount of \$26,137.15?

A. You mean, what I was being paid for?

Q. Yes.

A. There was the stock \$25,000, my salary, and while not mentioned at the station that day, when I was going out they did add a desk and some chairs that I had there, which was private property.

Q. Is it the salary and the desk and chairs that prevents the amount from being an even \$25,000?

A. Yes, that is what makes the difference.

COURT.—Desk and chairs, what do you mean by that?

A. I had a desk of my own and some chairs.

Q. Now, what did you give in return?

A. I assigned my stock and gave it to him.

Q. When you say you assigned it, in what way did you assign it?



(Testimony of E. W. A. Peake.)

A. I asked what he wanted.

Q. I don't mean that. What was the physical thing? A. I assigned it in blank.

Q. That is you indorsed it?

A. Indorsed it in blank, yes.

Q. Did you deliver it to Mr. Boss? A. Yes.

Q. What about Miss Bieteau's stock? You owned that, didn't you?

A. I owned that, and I delivered that up at the same time.

Q. Indorsed by Miss Bieteau?

A. Indorsed by Miss Bieteau. [262—187]

Q. Did Mr. Boss accept these certificates of stock?

A. Yes, sir.

Q. Did you lend any money in this transaction to any one?

A. Yes, I loaned Mr. Boss some money.

Q. How much? A. I think it was \$9600.

Q. What security, if any, did you take for that loan?

A. Well, I think that it was warehouse receipts mostly on Hudson cars.

COURT.—Warehouse receipts?

A. Warehouse receipts, I believe.

Q. Were there some title papers, either promissory notes or title papers also?

A. Yes. Mr. Boss' notes were secured by these warehouse receipts, or cars, or whatever it was. I had Mr. Boss' notes for \$9600, as I remember it, and that was secured by title notes, or I think it was warehouse receipts. I have no record of that.

(Testimony of E. W. A. Peake.)

Q. You have no record of the documents themselves now?

A. Not of the documents themselves, no.

Q. Let me hand you two documents which have been identified, marked Boss' Exhibit "D," and ask you if those are two of the notes you took at that time? A. Yes, sir.

Q. It has been stated, Mr. Peake, that you took the eight cars themselves and sold them back to the partnership. Is that a fact? A. No, sir.

Q. What was your transaction respecting the cars? A sale or what?

A. Well, I expected to get my money in cash, but at the last [263—188] day—I think it was about the 30th—Mr. Boss said that he had been disappointed in some of his money; and I was very anxious to get the thing closed up, so I suggested that I would loan him the money to make up the amount, the \$9600, on this security.

Q. Now, it appears that those notes that you have there, that were just referred to, are signed C. L. Boss Automobile Co. Do you know whether they were signed that way at the time?

A. Yes, I knew they were signed C. L. Boss Automobile Co.

Q. They were signed that way at the time?

A. Yes, sir.

Q. How did you come to take the notes signed C. L. Boss Automobile Company?

A. Well, Mr. Boss was owner of all of the stock in the company; I was getting warehouse receipts;

(Testimony of E. W. A. Peake.)

and whether it was the company or Mr. Boss owned the security, I didn't give very much thought. I considered them perfectly good.

Q. Had there been, prior to this transaction, any conversations between you and Mr. Boss concerning your name after you sold your stock? A. No.

Q. The use of your name in the business?

A. There was never any discussion on that at all.

Q. Did you at any time, in any part of these transactions, insist, or did you request that the corporation be dissolved? A. Absolutely not.

Q. Did you care whether it was dissolved or not?

A. No, I did not.

Mr. LOGAN.—Objected to.

Mr. REILLY.—Your complaint says that he insisted upon dissolution. I think it is only fair to ask the witness [264—189] whether he cared whether it dissolved or not.

Q. Did you know, prior to this tax question arising in 1920, in the summer of 1920, whether the corporation had been dissolved or not?

A. No, I really didn't know.

COURT.—Had you anything to do with the organization of the C. L. Boss Automobile Company?

A. No, I had nothing to do with that at all.

COURT.—Never had any interest in it in any way? A. Never had any interest in it at all.

Q. That note of Boss' of \$9600 was paid and the security returned? A. Yes, sir.

Q. Now, it has been stated that you received in

(Testimony of E. W. A. Peake.)

this transaction your salary, the small sum for your desk, \$25,000 for your stock, and eight automobiles. Is that a fact?

A. Why, no. The twenty-six thousand dollars paid in full, without any automobiles.

COURT.—Is that your position, Mr. Smith—that he received eight automobiles?

Mr. SMITH.—Yes, your Honor. I think we can show the court he did.

Mr. REILLY.—In addition to the twenty-six thousand dollars?

Mr. SMITH.—I will explain his position by him, and he will admit it in three minutes, or before I get through with him. This man went to the bank with Mr. Boss when Boss made out this deposit slip, and he will not deny that; that he knew every cent that went into that deposit slip, which aggregates \$26,137.15. [265—190]

COURT.—Do you claim that Mr. Peake got these automobiles out of the corporation?

Mr. SMITH.—He did, yes.

COURT.—In what capacity?

Mr. SMITH.—He took it for himself.

COURT.—He took it for himself and became the owner of the automobiles?

Mr. SMITH.—He took it for himself, and he sold it back to us on these conditional sale notes. When we paid him the notes, we paid him for them.

COURT.—Did he take automobiles as security or as purchase?

Mr. SMITH.—That I will leave for the court to



(Testimony of E. W. A. Peake.)

determine when the facts are shown. I think it will come out very clearly on his cross-examination. Anyway, he got the money out of them, whether he took them one way or the other.

Mr. REILLY.—It is well for us to know, your Honor. He even conceals the intention he had.

COURT.—You go ahead with your examination. I was rather surprised.

Mr. REILLY.—I am also, your Honor. It came out of a clear sky to me yesterday.

COURT.—Very well.

Mr. LOGAN.—This involves the Government's contention, too.

COURT.—I don't think there is much left for the Government. It seems to be clear.

Mr. SMITH.—All the Government needs is its money.

Q. All right, Mr. Peake. After you disposed of your stock and received this check, did you go near the business any more? A. No, sir. [266—191]

Q. Were you ever in their place of business after that time?

A. I think I walked into the place the next morning for something. I wasn't in there over a minute, and I haven't been in the place since.

Q. Did you go with them to Mr. Logan's office at any time? A. No, sir.

Q. Either before or after this transaction?

A. No. I have never met Mr. Logan before.

(Testimony of E. W. A. Peake.)

Cross-examination.

(Questions by Mr. HUMPHREYS.)

Did you know at the time that this matter was concluded, Mr. Peake, I mean on either the 31st of May or the 1st of June, that the corporation of which you had theretofore been a part was going to continue or was not going to continue in the automobile business?

A. I did not know anything about that at all.

Q. You did not know whether the business was to be continued by the partnership?

A. I didn't know whether it would be continued as a corporation or as a partnership. When he acquired the stock, I felt that I was through with it, and had no further interest.

Q. You knew that the automobiles which were given to you as security had been up to that time the property of the corporation?

A. Yes, they had up to that time been the property of the corporation.

Cross-examination by Mr. SMITH.

Q. How long have you known Mr. McRell?

A. I met Mr. McRell when I went into the business about November, 1917-1916. [267-192]

Q. At that time he was a salesman, or connected in some way with the business?

A. Yes, he was the territory man.

Q. Did you ever talk with him about your dissolution with Mr. Boss? A. No, sir.

Q. Was he present at the depot when you were talking to Mr. Boss? A. No, sir.

(Testimony of E. W. A. Peake.)

Q. He wasn't there at all?

A. No, sir. He was at the depot, but not with Mr. Boss and I when we made our arrangements.

Q. How far was he from you?

A. Well, he wasn't within fifty feet.

Q. Not within fifty feet? A. No.

Q. That is when you had this McCornack conversation?

A. No. When Mr. McCornack was there, he was with us.

Q. That is what I am referring to; when Mr. McCornack was there, Mr. McRell was with you, wasn't he? A. Yes.

Q. Did you have any talk that day in Mr. McRell's presence about distribution and dissolution, or cessation of business? A. No, sir.

Q. Nothing there said? A. No, sir.

Q. When was it you had talk with Mr. Boss about dissolution and distribution?

Mr. REILLY.—This question is obviously designed to trap the witness, and it is an unfair question. The witness has testified to the conversation that occurred down there. The question asked him now puts a version upon it which, if the witness answers either Yes or No, whichever way it is, or [268—193] anything practically, he is committed to something which in fairness he should not be required to answer.

Mr. SMITH.—I will withdraw the form of the question, and use whatever form you say.

(Testimony of E. W. A. Peake.)

Mr. REILLY.—I think you know how to do it, without any trouble whatever.

Q. Did you have any talk with Mr. Boss about your getting out of the corporation?

A. Why, yes, away back in March.

Q. Did you have any other conversation with him between March of 1917 and June 1, 1917, about your getting out of the corporation?

A. Nothing to amount to anything, only asking when he would be able to be in a position to buy.

Q. You asked him when he would be in a position to buy? A. Yes.

Q. Did he tell you the condition of his finances?

A. Possibly. I don't particularly remember.

Q. During that time, between March, 1917, and June 1, 1917, you had full access to the books of your own corporation, didn't you? A. Yes.

Q. Have any trial balances?

A. Yes, Mr. Murphy got out a trial balance.

Q. How many trial balances did you have?

A. I do not know.

Q. Several, didn't you?

A. I wouldn't even say that, I think there were several.

Q. Several? A. Yes.

Q. How frequently did Mr. Murphy give you trial balances? [269—194]

A. That I couldn't tell you.

Q. When he got out those trial balances, didn't he give a copy to you for your desk, and one to Mr. Boss for him, for his information? A. No, sir.



(Testimony of E. W. A. Peake.)

Q. Did he make just one trial balance?

A. That is my memory, that there was only one.

Q. Did he give it to you or Mr. Boss, or keep it in his own possession?

A. I looked over it, and then we could either of us refer to it, as we wished.

Q. After you and Mr. Boss looked over it, did you discuss its contents to see how the business was getting on, see how things were going?

A. I don't remember any special discussion on it.

Q. Did you talk with Mr. Boss about how affairs were getting on?

A. We were always well satisfied as to the money-making part of the business.

Q. Both you and Mr. Boss were well posted as to the condition of the business?

A. Fairly well posted, I think.

Q. You knew the latter part of May, 1917, you knew about what you had made, didn't you? You knew the profits?

A. In a general way.

Q. What were they?

A. Well, I know now. I didn't know at the time.

Q. Oh! You examined those trial balances, and you didn't know what profits you were making? Is that right?

A. Yes, because the trial balance had not been made out in June or May. [270—195]

Q. When was it made before that?

A. It might have been made in—I don't know; it wasn't made at the time I went out.

(Testimony of E. W. A. Peake.)

Q. Didn't you say a moment ago that you had several trial balances between March and June?

A. Between March and June?

Q. Yes. A. No; from the time I went in.

Q. From the time you went in? A. Yes.

Q. How many trial balances did you have from November, 1916, up to June 1, 1917?

A. I do not know.

Q. Did you have more than one?

A. I would fancy all I could remember would be two or three.

Q. Did you have one every month?

A. I do not think so.

Q. When will you say you got those two or three trial balances? A. I don't know.

Q. But you did have two or three?

A. Yes, there were two or three made out.

Q. How near to June 1, 1917, did you have a trial balance made?

A. That would be impossible for me to say. I don't know. Mr. Boss has the trial balances; he should produce them.

Q. Did you, in addition to the trial balances, have access to the books? A. Certainly.

Q. You knew about how the sales accounts were going? A. Yes.

Q. You knew about the amount of business you were doing? A. Yes.

Q. And you knew that in your books you had a separate record of each car that was sold, showing specifically the items of [271—196] expense, the

(Testimony of E. W. A. Pealke.)

first cost, to whom sold, the amount received, and the profit, didn't you?     A. Yes.

Q. So you knew about what the profits were?

A. In a very general way.

Q. Well, what were they? What was your knowledge?

A. My knowledge is not very definite. I had an idea what the business was doing. That was all.

Q. What was your idea when you sold out for \$25,000, as you say, on your stock—what was your idea of what the profits were?

A. My idea of my profit would be \$10,000.

Q. Where did you get that idea?

A. From the sale of my stock.

Q. And you figured that on to the par value of the stock in order to arrive at the \$25,000, didn't you?     A. Yes.

Q. That is how you got \$25,000, was that you said you had put in \$15,000 on the face value of the stock, and you added to that the \$10,000 profits, didn't you?     A. Yes.

Q. Now, then, at the time that you decided to sell out to Mr. Boss, was there any talk there about Boss forming a partnership with Mr. McRell?

A. At the time I sold to Mr. Boss?

Q. Yes, on June 1st?

A. He said Mr. McRell was going to put in money.

Q. He told you that?     A. Yes.

Q. When did he tell you that?

(Testimony of E. W. A. Peake.)

A. I don't remember.

Q. Was it before or after you got this twenty-six thousand [272—197] dollar check?

A. It would be between the 20th, the time I made the price to Mr. Boss, and the time I went out.

Q. Well anyway, then, you knew that he and Mr. McRell were going in together before you got your twenty-six thousand dollar check, didn't you?

A. I knew that Mr. McRell expected to put money into the business.

Q. Did you know he was going in with Mr. Boss as a partner?      A. I did not.

Q. How does it come you made this \$9600 check, that is part of this exhibit attached to this deposit slip, that you made that to the C. L. Boss Automobile Company?

A. Well, that is one thing, that Mr. Boss could change the name of the company, or he could run as a partnership, or he could run it himself. It made no difference to me.

Q. But you said you sold your stock to Mr. Boss in the Boss & Peake Automobile Company?

A. Yes.

Q. And you knew that company had not been dissolved, didn't you?      A. Yes.

Q. Then, why did you make this check to another concern?

A. Well, why couldn't he make it. I was indifferent who made the notes, as long as I had the security. I considered that the company was his,



(Testimony of E. W. A. Peake.)

as he had purchased all the stock and could do as he saw fit with the assets.

Q. You didn't care, then, to whom you made that check?

A. Not at all. If he had asked me to make it to Mr. McRell, I would have made it to him.

Q. You never had done business with the C. L. Boss Automobile [273—198] Company, had you?

A. No.

Q. Never heard of it before?

A. Never heard of it before.

Q. When was the first time you heard of C. L. Boss Automobile Company?

A. The first time I ever heard of it was when I asked him "Whom shall I make the check to?" He said "Make it to the C. L. Boss"—I had it "C. L. Boss"—he said "Make it Automobile Company." So I added "Automobile Company" to it here.

Q. What is the date of that check, please?

A. June 1st.

Q. 1917? A. 1917.

Q. When did you give Mr. Boss that check?

A. I gave it to him, I presume, on June 1st.

Q. What time of day?

A. I don't remember.

Q. Was it the morning or afternoon?

A. I do not know.

Q. Did you know what he was going to do with that check when you gave it to him?

A. Well, I supposed he would cash it.

(Testimony of E. W. A. Peake.)

Q. Did you go with him to the bank to see that he deposited that?

A. Well, if I was with him at the bank, it was not for any reason to see that he deposited it.

Q. Will you kindly answer the question: Did you go with him to the bank that morning?

A. Yes, I went with him to the bank.

Q. And you were there, standing by his side, when he made out that deposit slip there that you have in your hand, weren't you?

A. If I was, I certainly didn't see it.

Q. Will you kindly answer the question: Were you there by his side when he was making out that deposit slip? [274—199] A. Not by his side, no.

Q. How far away were you?

A. I don't know.

Q. You were there anyhow?

A. I was in the bank.

Q. What were you there for?

A. That is where we made our arrangements to go down there to settle up. I was to meet him there with my stock, and he was to have his check and other stuff there.

Q. You knew you had to loan him \$9600 to make up the sum you claimed he paid you?

A. Yes, sir.

Q. You did lend it to him?

A. Yes, I did lend it to him.

Q. You were there at the bank when he made out that deposit slip?

(Testimony of E. W. A. Peake.)

A. I don't know he made it out even in the bank. I presume he did. I have no recollection of it.

Q. Did you know where he was getting the rest of his money to pay you such a sum as \$26,137.15?

A. Well, I knew he was borrowing some money from Mr. Farrington. That was all.

Q. Did he tell you how much he borrowed from Mr. Farrington?

A. No, he didn't, because I didn't know.

Q. Did he tell you he was borrowing the entire balance from Mr. Farrington? A. No.

Q. You knew that he wasn't, didn't you?

A. I didn't know. He had several prospects of getting money. What developed and what didn't develop, I had no knowledge of.

Q. I will call your attention now to this deposit slip. I call your attention to this check dated June 1, 1917, No. 2595, by Boss & Peake Automobile Company in favor of C. L. Boss for [275—200] \$8537.15, and I will show you the deposit slip again. You were there in the bank when Mr. Boss made the deposit, weren't you?

A. I cannot say that. I wasn't near Mr. Boss when I made the deposit, and neither did I see his deposit slip.

Q. You went with him to the bank that morning to close it up all at once, didn't you? A. Yes.

Q. You knew he had taken that check from Boss & Peake Automobile Company, didn't you?

A. I didn't know anything about his deposit whatever.

(Testimony of E. W. A. Peake.)

Q. You didn't care how he got the \$26,137.15 that you got?

A. No, it didn't make any difference to me.

Q. Weren't you there, Mr. Peake, to see that Mr. Boss made this deposit as per that slip and those three items before you accepted his check, which I now show you, dated June 1, 1917, on the First National Bank for \$26,137.15, signed Charles L. Boss? A. No, I wasn't there for that purpose.

Q. Didn't you see that he had that amount on deposit before you took this check?

A. I did not.

Q. Did you take a check of this size from him without knowing whether he had the money in the bank? A. I did.

Q. Yet you loaned him \$9600 of this sum yourself to pay yourself with? A. Yes.

Q. Now, on that same day, Mr. Peake, you took eight notes on the form of this yellow note?

Mr. MAGUIRE.—No—just a moment. Don't mislead the [276—201] witness. There are two forms. There were only eight notes given. Part of them were green ones.

Q. Did you take eight notes of this character?

A. This or similar character.

Q. Did you also take eight other documents of this character, of the one in blue, as part of the same transaction?

A. I don't know. I took notes to the value of \$9600.

Q. What was that for? A. These notes?



(Testimony of E. W. A. Peake.)

Q. Yes.

A. Mr. Boss' notes for the check I was giving him.

Q. Giving to Boss?      A. Yes.

Q. You also got the money back on that, didn't you?      A. Certainly.

Q. You gave him \$9600 on your check, and you immediately pulled it out on this \$26,000 check, didn't you?

A. Well, I don't know. I cashed my check.

Q. Yes.

A. Deposited my check. I didn't cash my check there, or certify it. I went over and put it through the bank in the ordinary course of business.

Q. You turned up with the \$26,000 plus the eight notes of \$1200 each, didn't you?      A. No.

Q. What did you do with those eight notes of \$1200 each?

A. All I got was \$26,000, of which I loaned him the \$9,000.

Q. Didn't you have these notes in addition that day—these eight notes of \$1200 each?

A. Well, I had put up my check for them.

Q. That is what I am getting at. You got the \$26,000 itself, didn't you? [277—202]      A. Yes.

Q. And you also had the eight notes of \$1200 each?      A. For which I paid \$9600.

Q. Well, we will see.

COURT.—Did you have those notes as security, or in what capacity?

(Testimony of E. W. A. Peake.)

A. I had these notes, Mr. Boss' notes, with automobiles as security.

COURT.—You didn't buy those automobiles outright?

A. No, I had nothing to do with the automobiles. These notes were prepared by Mr. Murphy and sent down to Mr. Boss, in order that he could raise this that I was loaning him, \$9600. As to the form of the notes or anything like that, I had nothing to do. Mr. Murphy prepared them in regular course of business, for \$9600, and I gave him a check for \$9600.

Q. Each of these eight notes of \$1200 was afterwards paid in full to you, wasn't it? A. Yes.

Q. So that you got the \$9600 that they represented, didn't you? A. Yes.

Q. Then you got the \$26,000 on the check, didn't you? A. Yes.

Q. And the \$9600 on the notes?

A. Which I had paid.

Q. You loaned him—

A. Which I had money loaned, yes.

COURT.—What became of the automobiles?

A. I don't know. The notes were paid. What he did with the automobiles, I don't know.

COURT.—Were they turned back to him?

A. They were turned back to him, yes.

Q. Anyway, you got your money out of them?

A. Yes. I suppose he sold them in the ordinary course of [278—203] business.

Q. Suppose, then, Mr. Peake, that instead of

(Testimony of E. W. A. Peake.)

loaning Mr. Boss the \$9600, you had simply taken a check for \$16,537.15?

Mr. REILLY.—That is the twenty-six thousand less \$9600?

Mr. SMITH.—Yes, that is the twenty-six thousand less the \$9600.

Q. And the automobiles themselves, you would have had the exact amount, wouldn't you?

A. Yes; but I didn't do that.

Q. Now, I notice this check from Mr. Boss to you is signed by himself individually—the twenty-six thousand dollar check? A. Yes.

Q. It didn't run through the corporation?

A. No, that didn't go through the corporation.

COURT.—What is that—the \$9600?

Mr. REILLY.—The twenty-six thousand dollar payment for the stock, your Honor.

COURT.—Did you bank at the same bank you went to that morning?

A. No. I banked, I think it was at the Lumbermen's or the U. S.

COURT.—You took this check from there, and went over and put it in your own bank?

A. Yes, sir.

Q. You didn't do that until after you saw that this deposit was made by Boss in the First National Bank?

A. Oh, I didn't see that deposit slip.

Q. Well, excuse me. I don't mean that you actually saw the deposit slip, but you didn't take

(Testimony of E. W. A. Peake.)

that check over to your bank until you knew that Boss had made this deposit in that bank.

A. I knew Mr. Boss wouldn't make a check that wasn't good. [279—204]

Q. Answer my question. On that morning, weren't you careful enough to see that Boss made a deposit in the bank before you took that check over to your bank?

A. No, I didn't pay any attention to that at all.

Q. Yet you went to the First National Bank with him that morning?

A. Yes, we met there to close up the deal.

COURT.—Was it there you signed?

A. That was where I was to bring my stock, and Mr. Boss was to bring his settlement.

COURT.—Was that where you assigned the stock?

A. It was where I indorsed the stock over to Mr. Boss.

Q. And wasn't it there, and at the same time, that you yourself issued this check for \$9600 in favor of C. L. Boss Automobile Company, on the First National Bank of Portland, Oregon?

A. Well, I made this check out, and I made it out to C. L. Boss. Then he said to add "Automobile Company," and I added "Automobile Company" on it.

Q. Mr. Peake, you say that you cleared this check of Boss' through your bank?

A. I cleared through my bank. I forget which bank account I used at the time.



(Testimony of E. W. A. Peake.)

Q. Will you show me any indorsement or anything of the kind to indicate that?

A. Well, I just deposited it in the regular way.

Q. Deposited it where?

A. I don't know where it was deposited. I know I got the money.

COURT.—Have you got your bank-book?

A. I haven't got my bank-book. I could get it, I presume.

Q. Didn't you state a moment ago that you sent it through your own bank—the Lumbermen's?  
[280—205]

A. I am not sure. I had two or three accounts, and I am not sure which account I sent it through.

Q. There is nothing there to indicate you sent that through the Lumbermen's Bank, is there?

A. That is a matter of memory. I know I got the money on this check, and I thought I had deposited it in the regular way. I may have had an account in the First National Bank at that time. I don't know.

Q. What is your recollection now since you have seen the condition of that check?

A. I don't remember. I wouldn't say where I deposited the check. I know I got the money.

Q. You are an experienced financial man?

A. Oh, somewhat.

Q. You have handled finances a number of years?

A. Yes.

Q. Done a lot of banking business?      A. Yes.

Q. From the indorsements that you see on the

(Testimony of E. W. A. Peake.)

check you have in your hand, the twenty-six thousand dollar check, and its condition now, isn't it your conclusion that you deposited that right in the First National Bank itself?

A. Well, if I had my account at the First National Bank, I certainly deposited it there, but I don't remember.

Q. Did you put it on deposit or pull down the cash?

A. Well, I know I didn't take the cash. My memory would be that I had put it on deposit.

Q. Then you are mistaken in saying you cleared it through the Lumbermen's?

A. I didn't say positively. Wherever my account was, I put it there. I don't know which account it was. I have had accounts in all of them. [281—206]

Mr. REILLY.—We have sent for the witness' bank-book, your Honor.

COURT.—Very well.

Q. When was it you gave the stock over to Mr. Boss?

A. I gave it to him at the time he gave me the check.

Q. At the same place? A. Yes.

Q. In the First National Bank of Portland?

A. Yes.

Q. When was your resignation as an officer of the Boss & Peake Automobile Company written out, do you know?

(Testimony of E. W. A. Peake.)

A. Well, my impression is that it was made and given to him at the same time he got the stock.

Q. I will show you now this document—the pages are unnumbered—it is in the record book of the Boss & Peake Automobile Company; purports to be.

Mr. REILLY.—It is part of the sheets introduced in evidence.

Mr. SMITH.—All right.

Q. Purporting to be your resignation. Is that right? A. Yes.

Q. What is the date of it, please?

A. May 31st.

Q. May 31 is written in typewriting above, isn't it? A. Yes.

Q. It is also written in pen down here at the bottom, where the blank was left to fill in the correct date with the pen, wasn't it? A. Yes.

COURT.—Both those dates are May 31st, are they?

Mr. SMITH.—Yes, your Honor; typewritten one at the top, and one at the bottom is May 31st also.

COURT.—That was prior to this transaction at the bank?

Mr. SMITH.—The day before.

A. Well, I prepared my resignation that day, and delivered it [282—207] to Mr. Boss at the bank.

Q. I will show you now Peake's Exhibit "H," being stock certificate No. 2 of the Boss & Peake Automobile Company, for 149 shares. That was your certificate, wasn't it?

(Testimony of E. W. A. Peake.)

A. Yes, that was mine.

Q. Who was W. H. Bietau?

A. She was my secretary.

Q. I will show you now certificate No. 4 of the Boss & Peake Automobile Company for one share of stock in favor of W. H. Bietau, and ask you if that is one of the certificates you turned over, as you say?

A. Yes, I think that was the certificate I turned over.

Q. Now, I will again show you these separately, first showing you your own certificate of stock, and ask you to look at the back, the indorsement—the transfer. Those blanks are filled in in your own handwriting, aren't they? A. C. L. Boss?

Q. Yes. A. No, sir.

Q. Well, anyway, your signature is at the bottom, isn't it?

A. Wait a moment. Let's see which one this is.

Q. That is yours, Mr. Peake.

A. Yes, this is my signature.

Q. And what date does that bear, please?

A. May 31st.

Q. That is the day before you got this check?

A. Yes.

Q. I also show you certificate of stock from W. H. Bietau indorsed to Mr. McRell, and ask you what date that is made? A. May 31st.

Q. Now, then, can you tell us when and where you turned these certificates of stock over to Mr. Boss?



(Testimony of E. W. A. Peake.)

A. Well, it was down at the bank, when I got my check.

Q. You still cannot tell what time of day that was, whether in [283—208] the morning or the afternoon.

A. No, I couldn't say. My impression is it was the morning, but I am not sure.

Q. How does it happen you were dating these instruments on the 31st of May, if you didn't know anything about the change in business that was to take place on the first?

A. Well, I had all my stuff prepared ready for the day, on the 31st.

Q. That is what I want to know: Why did you prepare them in advance? A. Why did I?

Q. Yes. A. So as to have them ready.

Q. What talk did you have with Mr. Boss, if any, that led you to prepare these documents in advance?

A. Well, he was going to bring his stuff down, I had to have mine, the next day. That is all. We would both be ready for settlement.

Q. You had a talk with him on May 31st, then, did you? A. We made an appointment.

Q. Did you actually indorse these on May 31st, the day they are written there?

A. Well, I cannot remember that. They are dated that day, but I can't say whether.

Q. Did you actually have your resignation signed on May 31st?

A. I had all those things ready on May 31st.

(Testimony of E. W. A. Pealke.)

Q. Why did you prepare them May 31st? Why did you resign on May 31st unless you knew there was to be a change in business the next day?

A. Because I was severing my connection with the company that day.

Q. On May 31st? A. Yes. [284—209]

Q. Had you gone over the condition of the business on May 31st, before you filled out these blanks?

A. No, sir.

Q. Had you confirmed your opinion about your half of the profits being \$10,000?

A. No, sir.

Q. When did you form that opinion, that your half of the profits was \$10,000?

A. Well, I just made a lump sum guess at what I would take to go out.

Q. About when did you form that opinion?

A. I formed it very suddenly when I saw the atmosphere that was created down at the station.

Q. That was on May 21st, wasn't it?

A. That was on May 21st.

Q. You formed it right there? A. Absolutely.

Q. And when did you decide definitely that your share of the profits was \$10,000?

A. Right there.

Mr. REILLY.—He hasn't said.

A. What is that?

Mr. REILLY.—This is an attempt by means of phraseology to put—

A. I made up my mind to sell out for \$25,000 then and there.

(Testimony of E. W. A. Peake.)

Q. At that time you had in mind the condition of the business, didn't you?

A. I had a general knowledge of the business, yes.

Q. What else did you take into consideration in fixing the value of your stock, other than its original capital value and the \$10,000 dividends? [285—210]

A. Well, it was a pretty good business, making about \$5,000 a month.

Q. How much?

A. About \$5,000 a month at that time; between \$4,000 and \$5,000.

Q. And you charged nothing for that?

A. I didn't get very much for it, no.

Q. And the items, as I understand, that made up this \$25,000 were the original value of your stock \$15,000, plus the \$10,000 profit?

A. No; I just made an offer to Mr. Boss to sell at \$25,000.

Q. You fixed that sum as heretofore testified?

A. I fixed that sum at the Union Station.

Q. Now, at the time you sold to Mr. Boss, as you say, what conversation, if any, did you have about the dissolution of the Boss & Peake Automobile Company? A. None whatever.

Q. Had you had any before that time about its dissolution? A. None whatever.

Q. Never was discussed with you at all?

A. No, sir.

Q. Although it had your name?

A. Beg pardon?

(Testimony of E. W. A. Peake.)

Q. Although the Boss & Peake Automobile Company had your name in it? A. Yes.

Q. I want to recur again to this check of \$9600 to the C. L. Boss Automobile Company, and I call your attention to the fact that the edges of it are smooth, that it has no place for a number on it, and it is apparently just a blank form of counter check, isn't it? A. This is a counter check, yes.

Q. Where did you write that check?

A. First National Bank. [286—211]

Q. Down there in the bank itself? A. Yes.

Q. At the same time that Mr. Boss was there with you?

A. At the same time that he delivered the \$9600 security—security for \$9600.

Q. At the time he was there to make the deposit in order to pay you?

A. Yes, I presume so. I don't know whether he made the deposit then.

Q. In whose handwriting is the body of this yellow note here, dated June 1, 1917?

A. That is Mr. Murphy's, I think.

Q. In whose handwriting is the body of that blue note? A. That, I believe, is in Mr. Murphy's.

Q. Do you know when those notes were made out? A. They are marked June 1st.

Q. No, no; I am asking you, please, if you know when these were made out? Were they made out that morning, or the day before?

A. I do not know.

Q. You don't remember that? A. No.



(Testimony of E. W. A. Peake.)

Q. Did Mr. Murphy make them out at your request or Mr. Boss'?

A. He made them out at, I presume, Mr. Boss' request.

Q. Did you have anything to do with the making of those notes?

A. No, I had nothing to do with the making of those notes.

Q. Were you present when the notes were made?

A. No, sir.

Q. When did they first come into your possession?

A. They came into my possession, as I remember, at the bank.

Q. How did you have them there at that time?

A. Well, I presume they were delivered to me by Mr. Boss.

Q. Before these notes came into your possession, was there any [287—212] discussion between you and Mr. Boss about your taking the eight automobiles themselves? . A. Why, no.

Q. Wasn't there on that 31st of May a discussion between you and him on that?

A. I have no recollection of any discussion, only as taking those as security for his note.

Q. Then, you have no recollection of any discussion between you and Boss about your taking the eight automobiles themselves—eight Hudson Super Sixes?

A. Not taking the cars themselves, no.

Mr. REILLY.—If the Court please, this theory

(Testimony of E. W. A. Peake.)

that has been injected into the case is utterly at variance with the theory of the cross-complaint and the theory of the answer. If they are going to start a new theory, I think they ought to amend their pleadings, so we can make them stay put some place. We are entitled to have them on some definite ground, one ground or the other. Counsel is branching out into an absolutely theory—that instead of getting \$26,000 in cash, Mr. Peake got some money and some automobiles. It is absolutely opposed to his cross-complaint, and it is opposed to his answer to the Government's bill. In that situation, I think this theory should not be permitted to be pushed unless they want to amend their pleadings. They have got to take a stand somewhere.

Mr. SMITH.—We don't care to amend the pleadings, if the Court please. What I am showing to the Court is, that in a court of conscience, a court of equity, it is immaterial what form a transaction takes, that the Court looks right through it and sees what was done in effect; and if this evidence shows, which it does conclusively, in my judgment, that the effect of [288—213] this whole transaction was that he pulled down \$8537.15 of his own corporation's cash, and he also took eight of those automobiles from the stock in trade, in effect; whether as a fact or not, the effect of it is that; and he also took an \$8,000 borrowed money from Mr. Boss; and also took down his salary,—that he has depleted the assets of that corporation, and he

(Testimony of E. W. A. Peake.)

did it knowingly, on that first day of June, 1917. This is a tax that follows the profits. He got the profit in fixing the face amount that he says he charged for his stock, and in taking payment for that profit, he depleted the assets of that corporation; therefore the tax follows him. I don't care what form it took—whether it took the form of transfer of stock or transfer of the automobiles, or borrowed money, or what—there is nothing in conflict with it at all.

COURT.—It is very apparent here so far, by the one witness that has had anything to say about it, that those automobiles were taken as security, and not as part payment.

Mr. REILLY.—That is true, your Honor. The only point is, this inquiry is rambling along taking time entirely outside of the theory they make themselves.

Q. You made this loan to C. L. Boss individually, didn't you, this \$9600 loan that you claim to have made to C. L. Boss?

A. What are the notes signed—C. L. Boss or C. L. Boss Company—I forget which.

Q. Did you take a note from Mr. Boss for the \$9600?

A. I took notes from him, C. L. Boss or C. L. Boss Automobile Company, for them.

Q. Will you kindly answer my question: Did you take one note of \$9600?

A. No, not to my recollection; not one note. It

(Testimony of E. W. A. Peake.)

was eight [289—214] notes, was it not, for \$1200 each?

Q. The only notes that you took were the eight notes of \$1200 each?

A. Yes, that is my recollection.

Q. And those are these conditional sales forms that you have for the sale of an automobile?

Mr. REILLY.—They are not that now. One is a straight note, collateral note.

Mr. SMITH.—All right, let's see:

“\$1200.00                      Portland, Oregon, June 1, 1917.

For value received, I or we promise to pay to E. W. A. Peake or order Twelve hundred & no/100 dollars, in gold coin of the United States of America, with interest thereon in like gold coin at the rate of 8 per cent per annum from date until paid, payable in one installment of not less than \$1200.00 in any one payment, together with the full amount of interest due on this note at time of payment of each installment. The first payment to be made on demand (the rest scratched out) thereafter, until the whole sum, principal and interest, has been paid; if any of said installments are not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder hereof. And in case suit or action is instituted to collect this note, or any portion thereof, I or we promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit or action, and I or we expressly waive the provisions



(Testimony of E. W. A. Pealke.)

of and all benefit and advantage from any and all appraisement, homestead, stay and exemption laws now existing or hereafter made. [290—215]

This contract is given upon and for the sole consideration that E. W. A. Peake, hereinafter referred to as the second party, has agreed that upon the payment of the sum above mentioned, as above set forth, time being the essence hereof, the second party will sell, transfer and deliver unto the undersigned, the following described personal property, to wit:

One 1917 Hudson Super Six Automobile, Factory # J 253, Motor 30928, which said property has been entrusted to the care of the undersigned. It is expressly agreed that said property so entrusted is the property of the second party, and shall remain so until the second party shall make the aforesaid sale and transfer, after all payments shall have been made, as above provided. The undersigned hereby agrees to keep said property in good repair and condition, and to take the best care of the same, keeping it insured against loss by fire, theft and collision, in favor of the said second party, or . . . assigns in such company as may be designated by said second party in a sum sufficient to cover . . . or their interests therein at all times."

COURT.—Who repaid the money to you that you loaned to C. L. Boss Company?

A. Well, the check was usually brought in by Mr. Murphy.

(Testimony of E. W. A. Peake.)

COURT.—How is that?

A. Mr. Murphy, their bookkeeper, used to bring the checks in for it.

COURT.—Brought in checks to you in payment of that? A. Yes.

COURT.—Whose checks? [291—216]

A. C. L. Boss Automobile Company, I believe.

COURT.—It was a check of the C. L. Boss Automobile Company that repaid you the \$9600?

A. That he repaid me the \$9600.

COURT.—What became of these contracts when you got your money?

A. I turned them over to Mr. Murphy for C. L. Boss.

Mr. SMITH.—(Continuing reading:) “It is understood and agreed that the undersigned shall not sell, transfer, or otherwise dispose of said property nor remove same from the State of Oregon, without the written consent of second party. In case of default in the payment of any amount due as above provided, or in case the undersigned shall part with the possession of said personal property, or if same be removed from the State of Oregon without the consent of the second party, or whenever second party or the holder of this note deems the debt hereby evidenced insecure or if said property be secreted or seized by process of law, or attempted to be sold, encumbered or otherwise disposed of or abused or misused, the second party or . . . assigns shall have the right, at any time, without notice or remand, take, reclaim, re-

(Testimony of E. W. A. Peake.)

move, hold and sell said property at public or private sale, without notice, at any place, and credit the proceeds thereof, less expenses of taking, removing, holding and selling the property, including attorney's fees upon this note, or without sale indorse the true value of said property, less said expenses of taking, removing and holding the same and attorney's fees upon this note; and I agree to immediately pay any balance then remaining unpaid on this note, in consideration of the use, rental and [292—217] depreciation of said property. Suing upon this note or taking judgment thereon shall not until the suit or judgment is paid in full in cash, divest said company of title to said property, or prevent its reclaiming, selling and applying the proceeds or value thereof as aforesaid, or vest title to said property in said vendee; nor shall any delay in retaking said property, or in enforcing said note, or allowing said property to remain in the possession of the vendee after default, or the acceptance of any payment after default, be deemed to waive any right of said second party or . . . assigns to reclaim said property."

That is signed "C. L. Boss Automobile Co. By C. L. Boss."

Mr. REILLY.—You don't claim that that is not a usual form used in loaning money?

Mr. SMITH.—That I am not saying. I don't think it is myself.

Q. Do you know where this 1917 Hudson Super

(Testimony of E. W. A. Peake.)

Six car referred to in that was at that time, Mr. Peake?

A. No, no more than it was either with Mr. Boss or in the warehouse. I don't know which.

Q. Was it on the floor of the Boss & Peake Automobile Company, in your place of business, or was it down at the warehouse?

A. I don't remember.

Q. Now, isn't it a fact that it was at the warehouse, and that that is the reason you took the blue one?

Mr. LOGAN.—Oh, no, this one was at the store and the blue one was at the warehouse.

A. As I say, Mr. Murphy selected those forms and made out the notes, and I have no definite recollection where they were.

Q. Now, then, do you know how many of those eight notes were on the blue form and how many on the yellow form?

Mr. REILLY.—Find out what the blue form was. [293—218]

A. No, I don't remember.

Q. Weren't those represented by the blue form at the warehouse, with warehouse receipts attached, and the ones represented by the yellow form in the actual possession of the Boss & Peake Automobile Company at your place of business?

A. Very likely, yes.

Q. You admit that fact, don't you?

A. I say, it is very likely. I don't know whether they were or not.



(Testimony of E. W. A. Peake.)

Mr. SMITH.—Now, the blue form reads:

Mr. REILLY.—You don't need to read the comment about it. Point out the collateral security.

Mr. SMITH.—(Reading:) “And as collateral security for the payment of this note and for any other indebtedness which is now, or may hereafter be due by this corporation to said bank, this corporation herewith deposits the following personal property, to wit:” And in the handwriting of some one: “Occidental Warehouse & Transfer Co. Warehouse receipt covering 1917 Hudson Super Six Factory # H-20305, and this corporation hereby gives to the holder of this note complete authority to sell said collateral, or any part thereof, or any that may be received in exchange thereof, or in addition thereto.”

Mr. REILLY.—That is enough to show our purpose. If you want to read on, it is all right.

COURT.—I shall probably look at those things myself.

Mr. SMITH.—All right.

Q. You say that you don't remember the time of day you went to the bank?

A. Not definitely, no. [294—219]

Q. After you went to the bank, did you return to your place of business or not?

A. I certainly did some time, but when, I don't know.

Q. I mean, did you return that same day?

A. Yes.

(Testimony of E. W. A. Peake.)

Q. Did you transact any business there in the name of the corporation?

A. Not to the best of my knowledge. I do not know.

Q. I want to show you a photostatic copy, picture copy of a check dated Portland, Oregon, June 1, 1917, No. 2588, signed "Boss & Peake Automobile Co. By"—whose signature evidently appears on the check? A. That is my signature.

Q. You wrote that check, did you?

A. No, Mr. Murphy wrote it.

Q. I mean, that you issued it? You signed it as an officer of the company?

A. Mr. Murphy prepared this check, and gave it to me to sign. I didn't pay any especial attention to the check.

COURT.—What is the check?

Mr. SMITH.—Check of \$10.50 in favor of J. C. Corbin Co., dated June 1, 1917.

Q. Do you remember whether you wrote that check before you went to the bank with Mr. Boss, or not?

Mr. REILLY.—He says he didn't write the check.

Q. Well, sign it?

A. That check must have been written before I went out of the business.

Q. Upon what do you base that conclusion?

A. Well, I never signed anything after that.

Q. Have you any record in your possession

(Testimony of E. W. A. Peake.)

showing the time at [295—220] which these \$1200 notes were paid?

A. I presume I have that, yes.

Q. Have you a recollection, independent of the record, of approximately the time?

A. I know they were paid up very rapidly. I don't know how long, but they were paid very quickly.

Q. Anyway, they were paid separately later on, weren't they?

A. Yes, they were paid separately.

COURT.—Just let me ask: Was the process to release one of those obligations as you received payment on your note?

A. Yes, each one was separate, and as each note was paid I delivered the security.

COURT.—You released the security?

A. Yes.

COURT.—To whom did you release the security?

A. Mr. Murphy always came and got them, as bookkeeper for the C. L. Boss Automobile Company.

Mr. REILLY.—Does that answer your Honor's question? The witness evidently doesn't understand. The witness says Mr. Murphy. Does your Honor get a complete answer to your question?

COURT.—He said he was the bookkeeper.

Mr. REILLY.—For C. L. Boss Automobile Company?

A. For C. L. Boss Automobile Company, yes.

Mr. LOGAN.—He had been bookkeeper for Boss & Peake Automobile Company.

Recess until 2 P. M. [296—221]

Portland, Oregon, May 24, 1922, 2 P. M.

Mr. REILLY.—There is an explanation that I desire Mr. Peake to make. This morning when your Honor was asking him about what he did with the twenty-six thousand dollar check, he was under the impression that he had put it into the account which he had in the Lumbermen's National Bank. He had several accounts, and he has now his deposit-book in the First National Bank, which shows that deposit made on the first day of June. He was prepared immediately upon going to the stand to explain to your Honor that he was mistaken in thinking it was in the other account.

COURT.—You have that book here?

Mr. REILLY.—I have that book here, and will put it in evidence if your Honor desires.

COURT.—You might put it in evidence now, then.

(Deposit-book of the First National Bank of E. W. A. Peake, showing a deposit on June 1, 1917, of \$26,137.15, received in evidence and marked Peake's Exhibit "K.")

Mr. SMITH.—There were produced yesterday on request of counsel two sheets which they say were not the sheets they desired. I would like to take them with me.

Mr. MAGUIRE.—Yes, let me make a memorandum. [297—222]



(Testimony of E. W. A. Peake.)

Mr. SMITH.—The clerk has called my attention to the fact that these pages 159, 159-a and 159-b of this journal have not been separately marked. They have been referred to frequently in evidence.

COURT.—Very well. Let them be marked.

(Marked Boss' Exhibit "H.")

(Black Account-Book, Boss' Exhibit "I.")

(Combined Cash and Journal, Boss' Ex. "J.")

With the consent of counsel for all parties, the hearing in this case was continued to a date to be hereafter set. [298—223]

Portland, Oregon, July 7, 1922, 10 A. M.

E. W. A. PEAKE resumes the stand.

Cross-examination (Continued).

(Questions by Mr. SMITH.)

Did you know, or were you acquainted with any of the Government representatives who were experting the books or arriving at the amount of income tax down there?

A. Not that I know of, no.

Q. Did you know a Mr. Barber? A. Yes.

Q. Did he work with this gentleman?

A. I don't think he did, on that job.

Q. Didn't Mr. Barber work there at your place of business in estimating this tax? A. No, sir.

Q. Did you ever talk with Mr. Barber about it?

A. Yes, I told him about it.

Q. Then, how many times did you talk to Barber about the tax?

A. Oh, I don't know. He was doing some work

(Testimony of E. W. A. Peake.)

for the Twin States Motor Car Co., and he spoke of it—he came up to ask about that.

Q. Those talks that you had with Mr. Barber were long before you got this written notice from Mr. Boss, weren't they? A. Oh, no.

Q. When were they? A. After that.

Q. Do you say this written notice from Mr. Boss was the first time you ever heard of the levy of the income tax question?

A. Yes. That was the first, yes. [299—224]

Redirect Examination.

(Questions by Mr. REILLY.)

Mr. Peake, mention has been made of a check—I believe it was offered in evidence—ten dollars or some such small amount, dated June 1, with your signature on it. What was your practice there, before you left the corporation, with respect to signing checks in blank, if you did?

Mr. SMITH.—Objected to as incompetent. We asked him a specific question to show that he was there on June 1st, and that he transacted that piece of business, that he made that one check himself.

Mr. REILLY.—That is exactly the reason I am asking the question, to show he left there before June 1st, and the corporation people filled it in afterwards. He was not there transacting business on June 1st.

(Objection overruled.)

A. Mr. Murphy used to occasionally write a lot of checks and fill in the amounts, and sometimes

(Testimony of E. W. A. Peake.)

possibly they were not dated until the check was distributed or sent, and the party was held up.

Q. Did you transact any business of the Boss & Peake Automobile Company on June 1st?

A. None whatever, no.

Q. Have you been connected with the automobile business for a considerable time, Mr. Peake, in one way or another? A. Yes.

Q. How long?

A. Well, it must be eight or ten years.

Q. And are you familiar in a general way with the value of these various automobile agencies?

A. Yes, I have an idea. [300—225]

Q. Do you know what the value of the agency is held by the Boss & Peake Automobile Company on May 31, 1917, what that value was, the goodwill of the business?

A. Why, I think, at the rate they were making money at that time, and with the small capital, it was conservatively worth \$50,000.

Excused. [301—226]

### **Testimony of R. E. Murphy, for Defendant.**

R. E. MURPHY, called as a witness on behalf of defendant Peake, being first duly sworn, testified as follows:

#### **Direct Examination.**

(Questions by Mr. MAGUIRE.)

Your name is R. E. Murphy?

A. R. E. Murphy.

(Testimony of R. E. Murphy.)

Q. Were you ever employed by the Boss & Peake Automobile Company? A. Yes.

Q. In what capacity, Mr. Murphy?

A. Bookkeeper and general accountant.

Q. For what period of time were you employed by that corporation?

A. During the whole existence of the corporation.

Q. Have you been employed by the partnership which preceded the formation of the corporation?

A. Yes.

Q. And in the same capacity? A. Yes.

Q. And did you continue keeping the books of the business subsequent to the time that Mr. Peake sold out? A. Yes.

Q. And were all of the books under your own personal charge and supervision? A. Yes.

Q. Now, Mr. Murphy, I want to call your attention to what has been designated here as the Journal of the C. L. Boss Automobile [302—227] Company, and particularly to pages 159-a and 159-b. I note that that page appears at the end of the business for the month of May, 1917, and page 160 bears the heading of June, 1917. I want to ask you whether or not page 159-a and 159-b were made prior to the entries appearing on page 160? A. No, they were not.

Q. Will you state to the Court when those entries were, in fact, made?

A. Well, it is hard to tell exactly, but the fact that it numbers continuously 159, 160, etc., means



(Testimony of R. E. Murphy.)

that at some future date, when I was able to bring the work up to date, I put it in the part of the journal it belonged to, designating it 159-a, so that the consecutive numbers had been used, and this sheet was worked up at a later date.

Q. I want to call your attention to the entries on page 164 of this journal, and particularly to the entry "Capital A/c B. & P. A. Co., \$15,000," credit to "C. L. Boss, personal, \$15,000," and "Capital account," and state, if you can, approximately when those entries were made, if you can tell by the previous date in the book.

A. Well, it is very evident that they were after June 15th, and I should say that there is enough intervening work here to make it several days after June 15th.

Q. Now, bearing particularly attention to this entry here that I have just called your attention to on page 164, and to the entries which appear upon page 159-a, can you from those entries give any approximate date when the entries on 159-a were, in fact, made?

A. Yes, I should say that they were all part of the one transaction, that this work was brought at this time, at the same [303—228] time that this entry here was made.

Q. On 164?

A. Yes. I should say that page 164 was worked up at the same time that 159-a was.

Q. Now, will you state whether or not the journal is a book or original entry, in the sense that

(Testimony of R. E. Murphy.)

it was made at the time the transactions therein portrayed took place? A. Yes, in most cases.

Q. And where do you get the data for your journal entries?

A. Well, from very many different sources.

Q. Well, do they come from other books of entry? A. Some do, and some do not.

Q. Now, Mr. Murphy, I want to call your attention to the combined cash-book and journal for the month of June, being page 135, and to an entry appearing therein under date of June 19, 1917, and particularly to check 2804, \$4223.91, bearing the legend "Clearing account." Will you explain to the Court what that transaction was, and when it took place?

A. That was the date of the transfer, and represented the balance in the bank of the Boss & Peake Automobile Company, which at that date was being deposited to the C. L. Boss Automobile Company.

Q. The C. L. Boss Automobile Company was the partnership of Boss and McRell? A. Yes.

Q. Now, will you state whether or not prior to the 19th of June the funds of the business were deposited and kept in the Boss & Peake Automobile Company bank account?

A. Yes, up to June 19th.

Q. Now, turning back to page 118 of this cash-book, I note there a check numbered 2588 in amount of \$10.50, made payable [304—229] to J. C. Corbin Company, Maxwell insurance, various items.

(Testimony of R. E. Murphy.)

A. Yes.

Q. It has been testified, and the exhibit I believe is in evidence, that that check was signed by Mr. Peake. Do you know whether or not Mr. Peake transacted any business on behalf of the corporation on the first of June, 1917?

A. He didn't in that office. That is as much as I would know.

Mr. SMITH.—Just a moment.

A. The offices of the automobile house.

Q. Do you know how that check came to be signed by him, and what your practice was with regard to making out checks for general expense items, such as that?

A. It had been customary for Mr. Peake to leave one or two emergency checks as he would go out, and I would account to him when he came back as to what I had used the checks for. So that in that way this bill of Corbin's probably was presented one or two days before. It might have taken me that long to make the audit of the different items in order to pay it.

Mr. SMITH.—Just a moment, if the Court please. Have you any recollection of that being done in this instance? Have you any independent recollection of that being a fact in this transaction?

A. Not except that was the custom.

Mr. SMITH.—I move to strike the testimony, as being incompetent, irrelevant and immaterial.

COURT.—The testimony shows for itself, and

(Testimony of R. E. Murphy.)

the Court can apply it as may be proper. I will overrule the motion.

Q. Now, Mr. Murphy, was there any change at all made in the manner in which the business was carried on and the books [305—230] were kept, between the operations of the Boss & Peake Automobile Company and the C. L. Boss Automobile Company? A. No.

Q. Did you have any instructions to make any changes in the method of keeping books or the manner of transacting the business on June 1st, or immediately thereafter? A. No.

Q. Now, after Mr. Peake sold his stock in the Boss & Peake Automobile Company, did you have any conversation with Mr. Boss relative to your purchasing any stock in the corporation?

Mr. SMITH.—Just a moment. I don't want to object to counsel's asking questions his own way, but he based this upon transfer of stock. This witness doesn't know of the transaction. If that is meant just to identify the transaction, the question is not objectionable. He might have put in dates. You are speaking of it just to identify the transaction?

Mr. MAGUIRE.—I will use the words after June 1, 1917. I was trying to identify a date.

A. Yes.

Q. Will you state to the Court what that conversation was?

A. Mr. Boss wanted me to borrow \$3,000 from Mr. Peake to take some stock in the corporation.



(Testimony of R. E. Murphy.)

Q. And that was after Mr. Peake had retired from the business?

A. I believe it was the next day after.

Q. Now, Mr. Murphy, will you state whether or not there were any statements taken from the books of the Boss & Peake Automobile Company, during its corporate existence and prior to the time Mr. Peake retired from the company, showing the profits, the estimated profits of the business?

A. I don't recollect any. We took a monthly trial balance, [306—231] but of course that would not serve for that purpose.

Q. Why wouldn't a monthly trial balance show what the profits were?

Q. Well, that would require an inventory of all of the automobiles and used cars and parts and shop equipment, furniture and fixtures. It would take a period of about two weeks for an automobile house to do that.

Q. What is a trial balance for?

A. Merely a check on your postings, to verify that your entries are correct, for the period covered by the trial balance.

Q. In other words, just to see if your books balance?     A. Yes.

Q. I see. Now, then, Mr. Murphy, was any estimate taken off, or any statement taken off the books, any time from the 1st of May to the 1st of June, as to the status of the business?

A. None that I know of.

(Testimony of R. E. Murphy.)

Q. State whether or not your books were kept up to date? A. No, they were not.

Q. About how much were they behind at about that period?

A. Well, I couldn't say. I had more work than I could handle. Too much system was what the trouble was, and I couldn't keep it up. It was my own idea, and it didn't work out right.

Q. Did you have any conversation with Mr. Boss, after Mr. Peake had retired from the business, with regard to the purpose or idea which he had in mind in ordering so many Hudson cars?

A. Yes.

Q. What was that conversation?

A. Well, when Mr. Boss advised me that he bought Mr. Peake out, he called to my mind the number of different little troubles that they had had together, and the cars were coming faster [307—232] than they were needed, and at times I was able to get Mr. Peake to pay the drafts, even though it was in excess,—I could do that if Mr. Boss didn't interfere at the time, but if he did, then there was friction, and I was not able to influence Mr. Peake to take up the drafts. After the deal was finished, Mr. Boss said to me, he said, "You didn't know why I was doing these little things at the time, but you see I have his stock." That was the substance of it.

Q. I want to call your attention, Mr. Murphy, to two forms of note. They seem to be attached together, marked Boss' Exhibit "D." In whose

(Testimony of R. E. Murphy.)

handwriting are those notes, other than the signatures? A. They are in mine.

Q. Is the second note in yours also?

A. Yes.

COURT.—What are those notes?

Mr. MAGUIRE.—Two of the notes given on the eight Hudson cars taken as security.

Q. Now, do you know the history of those transactions? A. Yes, in a general way, I do.

Q. Where did you get your knowledge with regard to that?

A. Well, because it had been a custom in the business, and is yet, of borrowing money on cars in the warehouse.

Q. Those are the usual forms of notes when money is borrowed upon cars? A. Yes.

Q. Well, did Mr. Boss ever tell you that Mr. Peake had taken these cars over as his?

(Objected to as incompetent.)

Mr. MAGUIRE.—I think possibly that question is [308—233] objectionable. I will withdraw it.

Q. Did you ever have any conversation with Mr. Boss with regard to the giving of these particular notes and the purposes for which they were given?

A. Only his instructions to draw them up, and I knew very well the purpose of them.

Q. What were his instructions in regard to drawing them up?

A. Simply to make a note covering a certain number of cars, an individual note for each car,

(Testimony of R. E. Murphy.)

and he would borrow money on them and attach the warehouse receipts.

Q. When Mr. Boss had you make these various memorandums in the journal with regard to capital account and division of earnings, that I have called your attention to there, 159-a and 159-b, was anything said about this deal between him and Peake being a dissolution? A. No.

Q. What did he tell you as to what the nature of the transaction between him and Mr. Peake was?

A. He told me that he bought Mr. Peake's stock.

Q. Do you know whether or not in the ledger there was a capital account for Mr. Boss and Mr. Peake? A. Yes.

Q. And was that in the Boss & Peake books, or in what books? A. In the Boss & Peake books.

Q. Have you examined the ledger, Mr. Murphy? Have you been able to find those accounts?

A. No.

#### Cross-examination.

(Questions by Mr. SMITH.)

How long were you with the Boss & Peake [309—234] Automobile Company?

A. From November to May.

Q. How long were you with Mr. Boss in his business before that time?

A. Two years prior to that.

Q. And after June 1st, or on June 1, 1917, and from that on, the business there was run by Boss & McRell as a partnership, wasn't it?



(Testimony of R. E. Murphy.)

A. Well, I wouldn't say from that date.

Q. Well, when was it run by Boss and McRell as a partnership?

A. The records are from June 19th, though I don't know of any deal that they might have had together; but as far as the bookkeeping is concerned, the only way I can tell.

Q. You don't know of any arrangement they had previous to that to dissolve the Boss & Peake Automobile Company, prior to June 19, 1917?

A. Possibly I do.

Q. What do you know about it?

A. Well, I would have to refresh my memory on the minutes of the meetings, if there were any held.

Q. Isn't it a fact, Mr. Murphy, that you personally signed minutes of meeting for the dissolution of the Boss & Peake Automobile Company, the minutes which I now show you, which are dated June 14, 1917?

A. That corresponds pretty closely with the records, yes.

Q. Will you kindly answer my question? Isn't that the date that you signed that notice of the meeting for dissolution, on June 14, 1917?

Mr. MAGUIRE.—I thought you said minutes instead of notice. Which is it? [310—235]

Q. "Notice calling special meeting of the directors of the Boss & Peake Automobile Co. to consider proposition to dissolve said corporation under and by virtue of Sec. 6701, L. O. L." You

(Testimony of R. E. Murphy.)

signed that June 14th, didn't you?

A. From the records, I should say so.

Q. What is your recollection?

A. I haven't any recollection as to the dates, because I possibly signed it without paying very much attention to the dates.

Q. When was the first knowledge that you had that such a notice as that was going to be given?

A. I couldn't answer that, Mr. Smith. I didn't amount to very much in this thing. It was merely a matter of handing it to me for signature—one share of stock which was not paid for.

Q. It was several days before it was signed, wasn't it, when you knew there was going to be such a notice sent out? A. I couldn't say.

Q. You can't say it was not? A. No.

Q. You cannot say they failed to discuss with you as early as about June 1st that they were going to dissolve?

A. I wasn't consulted at all. It was not discussed with me.

Q. Will you kindly answer the question?

A. This was merely brought in for my signature, without any consultation whatsoever. I didn't put in figures.

Q. You cannot tell when it was you first knew they were going to take these steps to dissolve?

A. No, I cannot.

Q. You cannot deny, however, that it was as early as June 1st or May 31st?

A. No. [311—236]

(Testimony of R. E. Murphy.)

Q. When did you first hear of the partnership between Boss and McRell?

A. I cannot say. McRell put some money in there, but at that time, according to my recollection, it was not decided whether it would continue as a corporation or as a partnership.

Q. When was it that McRell put this money in it?

COURT.—What date was that?

A. I would have to consult the books.

Q. Look up the books and see. That is what I want.

A. I had no knowledge then as to whether it was to continue as a corporation. About what pages were we working?

Q. 159, 159-a and b, 160 to 164.

A. I am talking about the journal.

Q. I don't know the page there. Maybe opposite counsel can tell you.

Mr. REILLY.—What is that?

A. About what pages were we working on?

Mr. REILLY.—About 120.

A. Around June 2. It is dated June 6th.

Q. Then you knew at least as early as June 6th about the partnership, didn't you? A. No; no.

Q. When did you first learn about the partnership?

A. I should say it was around when we finally made the entries on the 19th, closing the corporation books.

(Testimony of R. E. Murphy.)

Q. And you never knew anything about it before then?

A. Possibly I did; but to my recollection, that is.

Q. I will show you these two notes that were called to your attention, the one in blue and the one in yellow. They are marked Boss' Exhibit "D" as one exhibit. They are in your [312—237] handwriting, aren't they, the body of them?

A. Yes.

Q. Do you notice the date up here at the top?

A. Yes.

Q. June 1st, isn't it? A. Yes.

Q. And the first thing it begins is "C. L. Boss Automobile Co. agrees to pay," isn't it? Something of that kind? A. Yes.

Q. Then you knew on June 1st that the C. L. Boss Automobile Company was doing business, didn't you?

A. No, we expected Mr. Peake's name to be dropped from the corporation. We had several conversations as to whether he would continue, whether Mr. Boss would continue with Mr. Peake's name in the business, and our idea was that the corporation name would change.

Q. Whose idea?

A. Mr. Peake and myself, both. We often wondered if he would continue as the Boss & Peake Automobile Company, or would he change the corporation name.

Q. And you still stayed in the employ of Boss after Peake dropped out? A. Yes.



(Testimony of R. E. Murphy.)

Q. And you wrote these notes in the name of C. L. Boss Automobile Company? A. Yes.

Q. And you were still wondering what name he was going to do business under?

A. Prior to that.

Q. Prior to June 1st? Oh. A. Yes.

Q. Then you and Mr. Peake were wondering, prior to June 1st, [313—238] what Mr. Boss was going to do? A. Yes.

Q. How long prior to June 1st?

A. As long as the conversation was up that Mr. Boss was going to buy Mr. Peake's stock, he wondered if he would continue using his name.

Q. So that before June 1st there was some discussion between you and Peake as to what Boss was going to do? Is that right?

A. Only to that extent.

Q. You knew that there was a contemplated change in the name before June 1st, didn't you?

A. Yes.

Q. How did you get that knowledge?

A. Simply from the fact that they were dicker-ing on the sale of stock, and I knew the feeling between them, and didn't think that Mr. Boss would continue to use Mr. Peake's name in the business after he was out.

Q. With that knowledge, you drew these two documents, putting in the name C. L. Boss Automobile Company? A. Yes.

Q. These were actually drawn when—June 1st or May 31st? A. June 1st, I should say.

(Testimony of R. E. Murphy.)

Q. You have no recollection as to the exact date?

A. Oh, well, the date should prove. I will go by the date.

Q. You will go by the date it bears up here?

A. It draws interest from that date.

Q. Did you actually make them up on June 1st or May 31st? A. June 1st.

Q. How did you happen to take that name C. L. Boss Automobile Company? Who told you to use that name? A. Mr. Boss. [314—239]

Q. What time of day do you say you drew those notes? A. I didn't say that.

Q. Isn't it a fact, Mr. Witness, that on June 1, 1917, you knew that Mr. Boss and Mr. McRell had executed this Assumed name agreement that was recorded, and in that agreement they take the name of the C. L. Boss Automobile Company?

A. I never saw that before in my life.

Q. And isn't that the reason you put in C. L. Boss Automobile Company in these two notes?

A. I don't know anything about this.

Q. You never saw this, you say? A. No.

Q. When did you actually know of it?

A. Since this case was started here, in Mr. Logan's office, I think I had the first intimation.

Q. When was that? A. A few weeks ago.

Q. And what was the occasion of your going to Mr. Logan's office to find this?

A. I accompanied Mr. Reilly for some information he wanted.

(Testimony of R. E. Murphy.)

Q. You had been hunting to find this of record, and failed to find it?

A. No, sir, I didn't know of such a thing.

Mr. REILLY.—I had, Mr. Smith; not Mr. Murphy.

Q. And you found a certified copy of it in Mr. Logan's office? A. I didn't. Mr. Reilly did.

Q. Now, after Mr. Peake dropped out of the business up there, you say the business was run along in the same way, just as it was before?

A. So far as any instructions to me were concerned.

Q. Well, did you see anything that indicated a change? A. Oh, yes. [315—240]

Q. What was it?

A. Mr. Peake was not there any more, and Mr. Boss and Mr. McRell were there.

Q. McRell had never been at that place before in the same capacity, had he?

A. I believe in the same capacity, yes.

Q. Mr. McRell was a salesman, wasn't he, before that time?

A. Same work I believe, that he does now. He was territory man.

Q. He was territory man before? A. Yes.

Q. After this, or about June 1st, he came into the business itself, didn't he? A. Yes.

Q. And Peake dropped out?

A. Yes. He continued as territory man.

Q. You knew from that, did you not, that Peake had gone and McRell come in? A. Yes.

(Testimony of R. E. Murphy.)

Q. Now, after Peake dropped out of the Boss & Peake association, how long did you remain with Mr. Boss, or with the association up there?

A. About six months.

Q. What business did you go in then?

A. In the automobile business.

Q. With whom?

A. With Mr. Peake and John Sharp, corporation.

Q. Then, you have been in business with Mr. Peake since then, have you? A. Yes, sir.

Q. When did you first agree to go in business with Mr. Peake— [316—241] before or after June 1, 1917? A. Seven months afterwards.

Q. When did you first talk to him about it?

A. Seven months afterwards.

Q. He has been backing you people financially?

A. He did for a short period.

Q. And concerning the values of some of these contracts for cars and agencies, you represent what agencies?

A. Chandler, Cleveland, Saxon, Roamer and Metz.

Q. They have been canceled, some of them, haven't they, recently?

A. Yes. I forced the cancellation, Mr. Smith.

Q. Anyway, they were canceled?

A. Yes; I forced it.

Q. You and Mr. Peake have been in numbers of consultations about this case, haven't you?



(Testimony of R. E. Murphy.)

A. No, I can't say that we have. I have had very little to say with Mr. Peake.

Q. Do you know anything of the actual terms under which Peake dropped out of the business and McRell came in?

A. Only hearsay. Only as told by the different parties.

Q. You didn't hear any agreement between Boss and Peake on the matter? Didn't hear them talk it over? A. No.

Q. Now, about these trial balances, how often do you say you took off trial balances?

A. Well, I tried to take them off once a month, but I didn't always do it.

Q. Did you take them off in duplicate or singly?

A. Singly.

Q. Did you make any statements there at all, whereby Mr. Boss [317—242] got one and Mr. Peake another of the same statements?

A. No, I don't remember that I did.

Q. Duplicate copies?

A. I simply filed them. They were there for the inspection of either of them, if they wanted them.

Q. Don't you know, as a matter of fact, that both Mr. Boss and Mr. Peake were in constant consultation with those reports you made out, getting at the status of the business?

A. They didn't seem to take much interest, especially Mr. Boss.

Q. How about Mr. Peake?

Mr. REILLY.—Are you talking about trial bal-

(Testimony of R. E. Murphy.)

ances or these alleged satisfactorily estimated statements?

Mr. SMITH.—Whether he calls them trial balances or whether Boss calls them satisfactory statements, it is immaterial.

Mr. REILLY.—You don't claim the two are the same?

Mr. SMITH.—That is what I want to find out from him.

Mr. REILLY.—I just wanted to know what you were inquiring about.

Mr. SMITH.—He will know, now you have told him.

Q. Is that the only balances or only statements you ever took off the books?

A. Yes, as far as I can remember.

Q. You won't say you didn't take off any other?

A. No, I won't say that.

Q. You might have taken off others you don't remember about at this time?

A. At that time I didn't take any.

Q. I am not speaking of any particular specific date; but you don't remember of having taken off any other statements except the trial balances?  
[318—243] A. No.

Q. And you cannot say that you didn't?

A. Well, yes, I can. The books were never in shape to take off a satisfactory statement. I was too far behind in my work.

Q. Is this document in your handwriting?

A. Yes.

(Testimony of R. E. Murphy.)

Q. When did you make that?

Mr. REILLY.—Just a moment. May I see it, please?

Q. When did you make that?

A. I couldn't say.

Q. For whom did you make it?

A. For the Government, I believe.

Q. For what purpose did you make it?

A. Income tax return.

COURT.—What is the date of that?

A. It is dated December 30, 1916.

Mr. REILLY.—Five months before this transaction.

Mr. SMITH.—Yes, I understand.

Mr. MAGUIRE.—After the corporation had been in existence six weeks.

Q. Now, isn't that a copy of a statement that you made showing the profits that were made for 1916, and didn't you make that for Mr. Peake at his request, and give it to him, and give Boss that one? A. No, sir; no, sir.

Q. Did you make more than one of that or not?

A. This is my work-sheet. I made an original to file with the Government.

Q. Did you give this to Peake? A. No.

Q. You never discussed it with him?

A. Possibly so.

Q. It does show the profits for 1916, doesn't it?

[319—244] A. Let me see.

Mr. REILLY.—The instrument speaks for itself, I think, your Honor, as to what it shows.

(Testimony of R. E. Murphy.)

Mr. MAGUIRE.—Let him go ahead and explain it. I beg your pardon.

Mr. REILLY.—All right.

A. Yes, it does show the profits for a period.

Q. And those profits are figured up here at this corner, and are no part of those blank answers or questions? Those profits are up there in your own figures in the corner, aren't they?

A. No, those don't appear to be profits. That is a little list of expenses.

Q. That is one set. Isn't this, in fact, the work-sheet that you prepared, from which the return of that corporation was made by Mr. Peake for the year 1916? A. By Mr. Peake?

Q. Yes.

A. No; it would be made by Boss & Peake Automobile Company.

Q. Well, I mean by him for the corporation?

A. I don't know who followed it up after me. I probably sent it in myself.

COURT.—Is that the work-sheet?

A. It is part of the work-sheet. It would take quite a number more of schedules to complete it. Part of the schedule is here in the corner, but the balance is not here.

Mr. SMITH.—We will ask to have this marked, if the Court please, and offer it in evidence.

(Marked Boss Exhibit "K.")

Q. Did you make this document, Boss' Exhibit "K," did you make that up as the business went



(Testimony of R. E. Murphy.)

along, or did you make it up at the end of the year from the trial balance? [320—245]

A. Just at the end of the tax year.

Q. I will show you now these two notes again, Boss' Exhibit "D," the blue one and the yellow one. Why were those two forms used, do you know?

A. I cannot see any significance in the difference of the two forms; probably just as a matter of convenience for stationery, is what I should say. I borrowed from Mr. Peake myself, and the notes may be on different kinds of paper.

Q. That is wholly immaterial. You don't recall anything as to why these two forms were used?

A. I wouldn't know of any reason why, except we happened to have the particular stationery.

Q. Isn't it true that one of these notes represents a car that was on the floor of the business, and the other a car in the warehouse?

A. Well, there is nothing to indicate that, that I would know. I couldn't say as to that. But in a case of that kind I would use either form. I don't see the difference in them.

Q. I call your attention to the body of these notes, that you say you filled in in your own handwriting. The blue one has this language: "Occidental Warehouse & Transfer Co. Warehouse receipt covering 1917 Hudson Super Six, Factory #H-20305." That is on the face of the blue one, isn't it? A. Yes.

(Testimony of R. E. Murphy.)

Mr. REILLY.—That note is green, isn't it, Mr. Smith?

Mr. SMITH.—Well, I will say green.

Q. The other one is yellow. There is no such language in that one, is there? A. No.

Q. You say that there was a capital account there in those [321—246] books of the Boss & Peake Automobile Company? A. Yes.

Q. And you don't find it now? A. No.

Q. Then, do you know what capital Mr. Peake had in and what capital Mr. Boss had?

A. My recollection is that \$30,000—I believe Mr. Peake had one share more; I am not quite sure—149 and 161.

Q. Otherwise, they were equal, weren't they—\$15,000 each? A. That was the idea, yes.

Q. Well, don't you remember that it was true—

A. No, I don't. My recollection is—that one share is what bothers me—it may be that each assigned a share, which possibly might be the case, and in that case it would be equal.

Q. One share went to you from Mr. Boss?

A. Yes.

Q. And one went to the stenographer of Mr. Peake's? Isn't that it?

A. I believe that is correct.

Q. But the capital account was \$15,000 each, they had involved in capital? A. Yes.

Q. Now, when did you say you had this conversation—if I remember your testimony correctly, you claimed to have had a conversation where

(Testimony of R. E. Murphy.)

Mr. Boss wanted to sell you some stock in the Boss & Peake Automobile Company?

A. He wanted me to borrow money from Mr. Peake to buy some stock.

Q. That was after Peake retired or before?

A. My recollection is that it was shortly afterwards, though I wouldn't be sure about it.

Q. Was it before or after you signed that notice that I showed you in these minutes? [322—247] A. I wouldn't be sure of that either.

Q. Was it before or after you wrote in these notes C. L. Boss Automobile Company?

A. I am not able to state the date, Mr. Smith.

Q. So you cannot say, then, when Boss wanted you to buy stock?

A. No, only that it was within a day or two of the terminal. I wouldn't say whether it was a day before or a day after. It was right at the time.

Q. You did have one share of stock in your own name?

A. No, I don't know that I ever saw it.

Q. I say it was in your name? I didn't say it was yours.

A. Yes. I didn't have access to the minutes or anything.

Q. All you had to do as stockholder after June 1st, all the steps you took after this Boss and Peake transaction, was with a view of dissolving the Boss & Peake Automobile Company, wasn't it?

A. Yes, finally.

Q. Now, if you wish to use any of the books in

(Testimony of R. E. Murphy.)

answering these questions, Mr. Witness, just let me know. I will be glad to hand them to you. As I recollect your testimony—I was sitting back there sometimes—as I recollect your testimony, it was substantially to the effect that the paging in the book you were referring to ran regularly—159, 160, 161, etc.; that there were some sheets put in between 159 and 160, making 159-a and 159-b?

A. Yes.

Q. What is your best recollection as to when you actually made those sheets and put them in that book?

A. From reference to the books, I should say June 19th.

Q. Is this it? A. Yes. [323—248]

Q. June 19th? A. Yes.

Q. That would be after you had signed this notice of the meeting, which is dated the 14th, wouldn't it?

A. Yes.

Q. These pages were not put in there with any view of trying to defeat the Government or anybody else out of any income tax, were they?

A. Absolutely not.

Q. And they were *bona fide* transactions, as far as you know?

A. It was the current work as taken up, to catch up with it.

Q. And the reason they did not appear regularly was that you were overcrowded? A. Yes.

Q. You cannot tell just what day those transactions took place?



(Testimony of R. E. Murphy.)

A. Only by using the date that shows that it followed the 15th, and then figuring how many days' work might have intervened.

Q. What I am after is, do you know the actual date any of these transactions took place?

A. No. My only proof is the date June 15th, that it must be after June 15th.

Q. There was never any intent on your part to show a transaction there except in its true light, was there, Mr. Murphy? A. No.

Q. Mr. Boss never tried to get you to do anything that was not absolutely right there, did he?

A. No.

Q. From your talks with him, and your conversations with him, and your work with him, was there ever any indication on his part that he wanted anything in those books except what was just in accordance with the plain facts? [324—249]

A. Yes, there was.

Q. Well, what was it?

Mr. REILLY.—It hasn't anything to do with this transfer of stock? A. No.

Mr. REILLY.—I don't know what is the use of hashing up their differences.

Mr. LOGAN.—That is all we are trying to get at, whether or not there was anything wrong between Mr. Boss and Mr. Peake in the transaction, or that Mr. Boss was trying to change the transaction different from what it was as between himself and Mr. Peake.

Mr. REILLY.—Objection withdrawn.

(Testimony of R. E. Murphy.)

Q. Go ahead.

A. There was a time, prior to the final close-out of the business, that Mr. Boss favored closing on an inventory basis and began taking an inventory at prices that I did not think were fair to Mr. Peake, and I at the time refused to inventory used cars at prices that I thought the cars would not bring on the market, and he asked me at that time if I thought more of Mr. Peake than I did of my job. I told him that that wasn't any consideration with me at all; that any work that I did for him would have to be done strictly according to—

Mr. LOGAN.—Let me interrupt you: What has that to do with changes on the books on the 19th of June? A. Nothing, Mr. Logan.

Mr. LOGAN.—Then none of these changes were made, so far as Mr. Boss' instructions to you, in any way changing the true status between Mr. Boss and Mr. Peake in June? [325—250]

A. No, sir, I don't mean to say that at all.

Mr. LOGAN.—That was the question, and your response was an entirely different proposition.

COURT.—When was this?

A. I should say it was a couple of months before June 1st, when they finally closed out.

(Examination by Mr. LOGAN.)

Q. That was a proposition that failed?

A. It did, yes.

Q. Now, the question that was put to you—if the court and counsel will pardon me for inter-

(Testimony of R. E. Murphy.)

jecting here—was on the framing of pages 159-a and 159-b.

A. It hadn't anything at all to do with that.

Q. There was nothing wrong in any of those transactions, was there?     A. No.

Q. There was no misrepresentation of Mr. Peake, was there?     A. No, indeed.

Q. There was no intent to help Mr. Boss as against either the Government or Mr. Peake, was there?

A. Oh, no. It was just my own laxity in keeping the work up. When I finally got to it I had to inject those two pages in order to get them into the main business. I had already used pages 161, etc., and simply made a duplicate of 159, designating it as "a" and the reverse side as "b," in order to get it into its proper section of the journal.

(Examination by Mr. SMITH resumed.)

Q. Every item you have in these pages represents a *bona fide* transaction as therein stated?

A. So far as I know. I wouldn't do anything else, I know. [326—251]

Q. There isn't anything there that is not true, is there?     A. No.

Q. You say that inventory was along about two months before?

A. That is just guessing roughly. They squabbled all the time they were in business together, and I was looking for a break-up, and it was during one of the squabbles. I couldn't say just when it was.

(Testimony of R. E. Murphy.)

Q. Now, Boss at that time was thinking of buying Peake out, as you say, at the time this inventory stuff came up?

A. I wouldn't know whether he was buying him out or selling to him.

Q. Anyway, there was a proposition up to buy or sell, one way or the other? A. Yes.

Q. You don't know which way it was?

A. Liable to hop either way, as far as I know.

Q. So that if Boss bought Peake, Boss would be charging himself too much on the cars that he was inventorying, wouldn't he?

A. If he used that particular statement, yes.

Q. Now, while you were there, Mr. Murphy, Mr. Peake was in constant touch with the finances of the corporation, wasn't he, after the corporation was formed? A. Yes.

Q. Wasn't he always insistent upon knowing just where the money was?

A. He had to be. That was his end of the business.

Q. Well, he was, wasn't he? A. Yes.

Q. He was insistent upon knowing just where the money was? Did he take up your time or bother you any in your work in [327—252] finding or looking after where the money was?

A. Not to speak of.

Q. Didn't you tell Mr. Boss that Mr. Peake was so insistent on your showing him where the money was all the time that it took up pretty near half your time to show him, or words to that effect?



(Testimony of R. E. Murphy.)

A. No, I don't remember that.

Q. Now, to return to these monthly trial balances, Mr. Murphy: At the time you took off each monthly trial balance, you would show the business for that month, wouldn't you, particularly?

A. Show what?

Q. Show the business for that month, the previous month, as represented on the trial balance?

A. The trial balance does not represent the business for the previous month.

Q. I will show you the ledger at the pages indicated: What account is this before you?

A. It is what I would call a merchandise account.

Q. In keeping your books out there, in running the ledger, you kept a strict account of every item as against each automobile that was sold, didn't you?

A. I tried to do that, but it was too much system.

Q. Too much system?

A. Too much system, yes. I found a better way of doing it.

Q. Take this J. B. Skinner automobile—is that the name there? A. Yes.

Q. That shows the sale price of the machine, does it? A. Yes.

Q. And shows every item of cost and expense and advertising and office— [328—253]

A. No, it shows the expenses that refer directly to the automobile. There is nothing of the overhead or the general expenses.

(Testimony of R. E. Murphy.)

Q. On each machine?

A. Each individual machine.

Q. When did you enter that up as to each individual machine? As of the date of sale, or when?

A. Those came in in dribblets. Those came in in dribblets covering a long period of time.

Q. You tried, then, to keep a detailed statement of each automobile right to date, so that you could tell what profit you had made on each one?

A. That is what I tried to do, yes.

Q. At any time that Mr. Peake had access to these books, he could tell how many cars were sold, couldn't he, by examining this book?

A. No, I don't believe he could. No.

Q. You could tell him, couldn't you?

A. Yes, with quite a bit of work. You understand that all of these accounts go to make one more account. It requires that you must pick out the different automobiles that are delivered from the different pages, and make a transfer to what you call Hudson Merchandise Account; and the segregation of those accounts, after getting in all the different entries of the individual cars, would show the profit or loss on that particular automobile.

Q. We will take as an illustration a theoretical case: Supposing that they were still in business, and you wanted to show the business that was done for the month of May, 1922, and you had sold 20 cars in the month of May, 1922, would they be entered as of the date of the sale to each person to whom [329—254] they were sold, and as many

(Testimony of R. E. Murphy.)

of these expenses put on as you had incurred up to that time and could find out?

A. As many as you knew of, yes.

Q. So your books at the end of the month of May would show all the sales you knew and all the expenses against each automobile that you knew of?

A. Yes.

Q. Mr. Peake had access to these at all times with you?

A. Yes, but there are items that follow—salesman's commission—insurance.

Q. They are minor items, aren't they?

A. They eat up your whole profits sometimes; and the sale of the used car you take in—you might take a used car in at a certain valuation, and when you come to sell it there is a depreciation of a couple of hundred dollars, which you might have overallowed on the car in order to make the sale. So that the credit that you put up against this automobile may be profit and may not be profit. It all depends on what becomes of the car that you traded for.

Q. But from the information that you had, and from your books, and from your trial balances that you took every month, and your being in constant communication with Mr. Peake, Mr. Peake was informed, was he not, as to the profits of the business right along, in a general, substantial way?

A. No. In a general way, but not in a substantial way.

Q. Where do you draw the distinction?

(Testimony of R. E. Murphy.)

A. Well, substantial, I would say, get it down to where your entries are all complete. Generally might be based on an idea of what the business was doing.

Q. I show you Combined Cash and Journal, month of June, 1917, [330—255] page 120. Are these entries over here in your handwriting?

A. Yes.

Q. Is there E. W. A. Peake capital account—is that \$15,000? . A. Yes.

Q. And what is this \$10,000, credit or something of the kind? A. Yes.

Q. Where did you get your information on which you made that entry?

A. I don't know that I could answer that. I believe it is my own idea.

Q. That is in your handwriting, isn't it?

A. Yes. I believe it is my own idea, that whole entry.

Q. Your own idea was that Peake some way pulled down \$10,000 profit? Is that it?

A. No, I had an account of \$15,000 capital account to close out. I didn't know any better way of doing it than taking \$15,000 and posting it opposite the other fifteen, which gave me a ruling in my ledger.

Q. What I am talking about is the \$10,000 item that reads, under Peake, "Do as earnings 11/25 to 5/31, \$10,000." That is in your handwriting there, isn't it?

A. Yes. There should be a ledger account to



(Testimony of R. E. Murphy.)

tell me how I handled that. I cannot tell from this book.

Q. Is this your ledger? A. No.

Q. Is there a book here that you want to refer to?

A. It is the pages that are missing. The ledger is here, but the capital accounts are not in it.

Q. Well, now, I will show you again. You don't mean to say that \$10,000 is a capital account?

A. I can only tell by referring to the ledger sheet how I [331—256] handled it.

Q. You segregated it so that you have \$15,000 capital account, haven't you, right here?

A. I needed that particular amount in order to balance the company books.

Q. Three lines below that is this \$10,000 account —\$10,000 charge.

A. That is, in all likelihood, posted in the same account with the \$15,000.

Q. And what is this entry? What does it say there? What have you got in there as to that \$10,000? How does it read?

A. "Ditto, earnings 11/25 to 5/31."

Q. You wouldn't put earnings in the capital account, would you?

A. Yes, I would. That is the trouble.

Q. I should say it would be a trouble.

A. Well, I don't know that it is, either. I should say yes, that is where it belonged. It looks to me that way—I don't know.

(Testimony of R. E. Murphy.)

Q. I will show you now this journal at page 159 and 159-a; those entries there are all in your handwriting, aren't they? A. Yes.

Q. Do you find over here, next to the last line, there is profit and loss account? Is that right?

A. Yes.

Q. You have profit and loss \$10,000 on the debit side? Is that right? A. Yes.

Q. And profit and loss "Do" \$11,373.32, and under that you have "E. W. A. Peake, dividend per agreement," haven't you? A. No. [332—257]

Q. What is that? A. Interest.

Q. Interest—excuse me; I couldn't see it—"Interest per agreement." Is that right? A. Yes.

Q. Right under that, "C. L. Boss 1/2 profits, \$11,373.32." Where did the other profits go to?

A. Peake would get that in the sale of his stock.

Q. In the sale of his stock. Don't your books show that he sold his stock for the \$15,000 face par value of the stock, and that the \$10,000 was pulled down as a dividend?

A. No. The books were not made up at the time. There was no way of arriving at what a division of the profits would be at that time.

Q. Why have you got this entry here under profit and loss account of the \$10,000, Peake, and eleven thousand and so on to Boss, when you now say it should be in the capital account?

A. I don't say that this should be in the capital account.

Q. Are those the same entries, that \$10,000 to

(Testimony of R. E. Murphy.)

Peake, the same as the \$10,000 to Peake in the other book I called your attention to?

A. One is a debit and one is a credit. They are offsetting entries.

Q. Offsetting. They relate to profit and loss account, and not to capital account, don't they, the \$10,000 entry?

A. No, no. Your profit and loss account is closed.

Q. Closed by the entry of \$10,000 to Peake and \$11,373 to Boss?

A. No. There is \$41,524.98. This may dissipate the profits. It may close the profit and loss account out. The discrepancy is due to the fact that there were not any figures to make the [333—258] settlement on when they made it, outside of the straight sale of stock. It later developed that there was \$1373.32 made by Mr. Boss on the transaction above what—

Q. There was how much made by him on the transaction?

A. \$1373.32. That is what that would indicate.

Q. Don't you know that that was Boss' one-half of the estimated expenses, and that the other thirteen hundred came from Peake?

A. No. This bookkeeping was done by me, as a matter of curiosity, to see how the thing finally would end itself up.

Q. It is a curiosity, I admit.

A. Probably so, but that was the purpose of it—my own initiative. Nobody suggested that I close

(Testimony of R. E. Murphy.)

them out that way, but I was just a little bit curious to see how it finally would end up.

Redirect Examination by Mr. REILLY.

Q. These entries about which you have been asked, in the journal, pages 159-a and 159-b, and these entries in the combined cash and journal under date of June 2, were those made after the transaction between Mr. Peake and Mr. Boss had been closed? A. Yes

Q. And did Mr. Peake have anything to do with the manner in which you showed these figures or put these figures into the books? A. No.

Q. Was the stock transferred and Mr. Peake completely out of the business when those figures were put into the books? A. Yes.

Mr. SMITH.—Stock transferred—of course, that—

Mr. REILLY.—The stock was transferred. It has been admitted that the stock was transferred. Although your pleadings don't admit it, your own witnesses have admitted it. We are not [334—259] making any violent presumption.

Q. Now, I notice, Mr. Murphy, in this combined cash and journal at page 120, about which you have been asked, that there is an entry there of \$26,137.15, stated, "C. L. Boss, by check, Capital account." Did that money ever actually go into the corporation?

COURT.—What was that?

Mr. REILLY.—There is a check given by Boss,



(Testimony of R. E. Murphy.)

the check that he gave to Peake—it was his personal check—he borrowed part of that money on his house, etc. It shows in the books, however. What I want to ask is, Did that \$26,137 represent anything that came into the corporation at all, or was that part of the entry, independent of the corporation's business, to clear these accounts up that you had? A. Well, sir; I couldn't say.

Q. What is that?

A. I couldn't say. I don't know.

Q. I think it probably speaks for itself. Is the item to which I have called your attention represented by the check that Mr. Boss gave to Mr. Peake, can you tell from your books?

A. I should say that it was.

**Recross-examination.**

Q. Can you tell what items make up that \$26,137.15, from all your books together?

A. It is here some place. I don't know just where it is. Let me see the ledger, will you, please. Perhaps the sheets that I am looking for are exhibits. Well, I can tell offhand, without getting at the exact figures. \$25,000 was for purchase of stock, a certain amount was salary that was drawn, and a certain amount was for furniture. [335—260]

Q. Who told you that \$25,000 was for purchase of stock?

A. Why, both Mr. Boss and Mr. Peake told me.

Q. Now, turn to page 159 again, 159-a, and also to the combined cash and journal at page 120.

(Testimony of R. E. Murphy.)

You stated awhile ago there was no misrepresentation in any of these entries, didn't you?

A. Yes, sir.

Q. These entries show \$15,000 for capital and \$10,000 for dividend, don't they? A. Yes.

Q. Then, how do you work that out that that makes \$25,000 for stock?

A. I don't see that there is any misrepresentation. It is my way of keeping the books, is all. If there is any fault to it, it is because I didn't know any better.

Q. You have been indebted to Mr. Peake up to within a very short time?

A. No, no; not to speak of. It has been over a year or so. Mr. Peake always had more of mine than I had of his when I borrowed from him.

Q. Peake is in business with you?

A. No, sir. Was in 1918. I haven't borrowed from him for two years.

Excused. [336—261]

### **Testimony of John F. Reilly, for Defendant.**

JOHN F. REILLY, called as a witness on behalf of defendant Peake, being first duly sworn, testified as follows:

#### **Direct Examination.**

(Questions by Mr. MAGUIRE.)

Your name is John F. Reilly? A. Yes.

Q. I will ask you, Mr. Reilly, whether or not you represented Mr. Peake in appearing before the of-

(Testimony of John F. Reilly.)

fice of the Collector of Internal Revenue, in this city, some time in 1920?

A. I did; when Mr. Peake got an envelope through the mail addressed to him, and on the inside of the envelope was a statement of a tax due from the Boss & Peake Automobile Company to the Government, which is in evidence here. It was either Government's Exhibit 2-A, or one similar to that.

Q. Did you proceed to that office?

A. I went down with Mr. Peake.

COURT.—What is that?

A. That is not a check, your Honor. It is notice and demand for tax, and it is addressed to Boss & Peake Automobile Co., 615 Washington St., Portland, Oregon. It came in that form, your Honor, in an envelope addressed on the outside "E. W. A. Peake, Esq., Dekum Building, Portland, Oregon"; that being Government's Exhibit 2-B, the envelope. I went down to the collector's office, and was referred to—saw Mr. Walker. And I took Mr. Peake with me, and I asked Mr. Walker if the Government—

Mr. HUMPHREYS.—What is the purpose of this?

A. The purpose is to show there is no demand.

Mr. HUMPHREYS.—The Government cannot be bound by what [337—262] conversation took place between an agent and Mr. Reilly. This demand speaks for itself. The notice is here, and in addition to that there is a letter there signed by

Mr. Peake, addressed to the collector of internal revenue, to show that he treated what he received as a demand upon him individually. I submit to your Honor the rights of the Government in this matter cannot be prejudiced in any way by any conversation between Mr. Reilly and any gentleman in the Custom-house.

Mr. MAGUIRE.—The Government has offered in evidence here a notice and demand for tax which is not addressed to the defendant Peake, but is addressed to the corporation.

Mr. HUMPHREYS.—In connection with that a letter from Mr. Peake relating to it.

Mr. MAGUIRE.—Exactly so. Now, I propose to prove by this witness that no demand was made, and that the collector of internal revenue's office and his deputy, who by law are the only persons who can make legal demand for payment of the tax, refused to make demand.

Mr. HUMPHREYS.—This was a demand, your Honor, and is so pleaded.

Mr. MAGUIRE.—It is not a demand upon the defendant Peake.

COURT.—Is this offered for the purpose of defeating the tax?

Mr. MAGUIRE.—It is offered for two purposes: It defeats beyond any question, your Honor, any right to either penalty or interest upon the tax. There isn't any question about that whatsoever. And there is a very serious question, your Honor, whether it doesn't defeat the tax so far as the de-



(Testimony of John F. Reilly.)

fendant Peake is concerned. Where the law says that a demand shall be made in certain form, and the regulation provides a certain [338—263] form, and that demand is not made, but a demand upon a corporation is made, and the person to whom the demand is mailed goes to the collector of internal revenue and says "If you want me to pay any of this tax, if that is what you put it in the mail for, make a demand upon me," and the collector of internal revenue or his deputy refuses to make the demand, then the Government cannot recover the tax from the individual, and particularly cannot recover penalty or interest from the individual.

COURT.—I will hear the testimony.

Q. Is Mr. Walker deputy collector of internal revenue?     A. He is.

Q. What conversation did you have with Mr. Walker with regard to this tax?

A. I said to Mr. Walker—asked him whether this was a demand upon Mr. Peake, pointed it out to him it was addressed to Boss & Peake Automobile Company. "Well," he said, "do you admit that you have any of the assets of the Boss & Peake Automobile Company?" And I said, "No." He said, "If you have any of the assets, you will have to pay the tax." I said, "Let's see the return that was made by the Boss & Peake Automobile Company that this tax was based on." And he said, in effect—I can't give you his exact language—that he would only let me see it if we would admit that we had part of the assets of the Boss & Peake

(Testimony of John F. Reilly.)

Automobile Company. In other words, he would let us see it if we would admit we owed whatever the tax was. And I then called his attention to the fact that this was not a demand upon Mr. Peake; that we did not want to get into a controversy with the Government, but that we could not—that the way this notice was sent, Mr. Peake could not pay [339—264] that tax, that half of the tax that seemed to be wanted from him and that is now being sued for, and recover from anybody, because, there not being a demand, it would be a voluntary payment, and he could not go back at the Government and show that the tax was not payable by him, because he would have made a voluntary payment. And I said, “Now, if you are taking the stand that Mr. Peake should pay any part of this tax, serve a demand on us.” And it seemed to amuse the gentleman quite a little bit, and he told me that they would not do anything further than they had already done; if we owed the money, we could pay it, but if we didn’t, why, he wasn’t concerned, but he wouldn’t make a demand.

Q. Was there anything else that took place at that time, Mr. Reilly?

A. I believe that that conversation was repeated about the demand, I think on at least two occasions this same conversation about the demand occurred, in which I pointed out to him that we were helpless in the matter, and could not avoid a controversy with the Government unless a demand were made on us. And he refused to make the demand. I

(Testimony of John F. Reilly.)

think that occurred in two conversations at least, that is all the conversations I had.

Cross-examination.

(Questions by Mr. HUMPHREYS.)

Do I understand you, Mr. Reilly, to say that the gentleman down there said in words he would not make a demand, or that he would simply do nothing further than had been done?

A. I cannot swear that he used the words, "I will not make a demand." I can swear that he refused my request that he [340—265] address a demand to Mr. Peake.

Q. And that was after he had sent the envelope which is here in evidence, addressed to Mr. Peake, by which it was mailed?

A. Yes, the envelope was addressed to Mr. Peake; not the contents.

Q. You say the envelope was addressed to Mr. Peake and not the contents?

A. The contents were addressed to the Boss & Peake Automobile Company.

Q. If the envelope was addressed to Mr. Peake, why weren't the contents addressed to him?

A. You will have to ask Mr. Walker, or somebody down there in the Government.

Q. Do you say that when a thing is addressed to a person in an envelope, the contents are not addressed to the individual whose name is on the envelope sent through the mail?

A. Certainly, Mr. Humphreys. Frequently mail is sent addressed to me on the outside, and when I

(Testimony of John F. Reilly.)

get on the inside I find that it is addressed to the O. W. R. & N. Company, and that I haven't a thing to do with it.

Q. And this was sent merely as a species of entertainment of the revenue officers, then?

A. Well, I am sure they didn't seek your advice before they did that.

Q. Now, did you dictate the letter which is dated August 18, 1920, and signed E. W. A. Peake?

A. I presume I did, Mr. Humphreys. I really haven't any distinct recollection of whether I dictated this letter or not.

Q. Are you able to say whether it was before or after you [341—266] went to the Custom-house?

A. I believe it was—I know, in fact, that it was before I made this last request for demand.

Q. And if you didn't consider that the notice in the registered envelope, Government's Exhibit 2, was a demand upon Mr. Peake, what was the purpose in writing this letter to which I have just referred?

A. Partly because we could not get them to make a demand, and obviously, if Mr. Peake could avoid a controversy with the Government, I wanted to enable him to avoid it.

Excused.

Mr. MAGUIRE.—Defendant Peake rests, may it please the Court.

Recess until 2 P. M. [342—267]



Portland, Oregon, July 7, 1922, 2 P. M.

**Testimony of C. L. Boss, in His Own Behalf (Recalled in Rebuttal).**

Direct Examination.

C. L. BOSS, recalled in rebuttal.

(Questions by Mr. SMITH.)

Did you hear the testimony of the witness Murphy, I believe he is the bookkeeper—is that his name?     A. Yes.

Q. Did you hear his statement as to your having requested him to buy any stock in the Boss & Peake Automobile Company?     A. Yes.

Q. Tell the Court about that circumstance, whatever there was to it.

A. I never offered any stock in the Boss & Peake Automobile Company; never contemplated keeping the Boss & Peake Automobile Company running at any time; never negotiated with anybody for selling Boss & Peake Automobile Company stock.

Q. Do you know how soon Mr. Murphy was informed of the transaction whereby you and Mr. McRell were to become the C. L. Boss Automobile Company?     A. Before the dissolution.

Q. When, in relation to these notes that he wrote up, of June 1st?

A. We had a short talk at that time.

Q. Now, concerning the talk that you and Mr. Peake had at the depot, tell the Court, please, where Mr. McRell was at that time. [343—268]

A. Right beside of me, just as he states in his testimony.

(Testimony of C. L. Boss.)

Q. And at the transaction at the First National Bank, I wish you would tell the Court fully everything that transpired there at the First National Bank, how the checks were passed, where the deposit was made, where Mr. McRell was, and the whole thing, just briefly.

A. We all met at the bank.

Mr. REILLY.—If the Court please, I don't believe this is rebuttal. The witness has gone fully through this, and my recollection is that Mr. Peake did not testify on the subject except on cross-examination.

COURT.—This witness testified about that.

Mr. SMITH.—Not fully.

Mr. REILLY.—Very fully.

Mr. SMITH.—Besides that, Mr. Peake attempted to state that Mr. McRell was not there at the immediate transaction at the bank; that he may have been in the bank, but that he was not right at the transaction. I want to show he was.

Mr. REILLY.—You may ask where Mr. McRell was. I don't think you ought to have this witness hash over this whole thing.

COURT.—You may ask about Mr. McRell.

A. Mr. McRell was there, and he stayed there during the entire transaction, and after the transaction was over, we left and went over to Mr. Logan's office.

Q. Do you know whether Mr. Peake took that twenty-six thousand dollar check over to another

(Testimony of C. L. Boss.)

bank, or did he deposit it there in the First National Bank as part of that transaction?

A. He waited until the deposit was made, and went to the window with me to see that my deposit was made, and then he [344—269] deposited it right there before we left.

Excused.

Mr. SMITH.—We have one other witness—Mr. McRell.

Mr. REILLY.—What do you expect Mr. McRell to testify to?

Mr. SMITH.—We expect to prove by Mr. McRell that McRell will say that he was personally present at and was practically participating in that transaction at the bank; that he knew all about it, was where he would know, and could state what transpired; and that he would testify the same as Mr. Boss.

Mr. REILLY.—I think we will concede that Mr. McRell, if here, would so testify.

Mr. SMITH.—That is all. Mr. Boss rests.

Mr. MAGUIRE.—We have no further testimony, your Honor.

Mr. REILLY.—Defendants Boss and Peake stipulate that the testimony in this case may be transcribed, with an original and two copies, at the joint expense of these two defendants, each to pay 50 per cent of the reporter's bill for that service; and it is further stipulated that, in the final settlement of the case, if either of the defendants prevails against the other, the party prevailing shall

be entitled to charge as costs the 50 per cent of the reporter's bill that he has paid.

Is that satisfactory, Mr. Logan?

Mr. LOGAN.—That is agreeable. [345—270]

Portland, Oregon, December 23, 1923.

I hereby certify that the foregoing transcript, consisting of pages 1 to 270, inclusive, is a full, true and correct transcript of the testimony in the case of the United States vs. Boss & Peake Automobile Company, a corporation, tried between the dates of May 22, 1922, and July 7, 1922, in the District Court of the United States for the District of Oregon, before Charles E. Wolverton, U. S. District Judge, and reported in said Court by me.

MARGARET A. FLEMING,

Reporter U. S. District Court, District of Oregon.

Statement of the Evidence. Filed February 19, 1923. G. H. Marsh, Clerk. [346]

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AND AFTERWARDS, to wit, on the 19th day of February, 1923, there was duly filed in said court a stipulation as to exhibits, in words and figures as follows, to wit: [347]



In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Stipulation as to Exhibits.**

The parties by counsel agree that in printing the transcript on appeal, the exhibits may be omitted therefrom, but that the said exhibits shall be sent by the Clerk of the U. S. District Court for the District of Oregon to the Clerk of the U. S. Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, for use on the appeal by either party.

Dated at Portland, Oregon, this 19th day of February, A. D. 1923.

THOS. H. MAGUIRE,

Asst. Attorney for Plaintiff.

JOHN F. LOGAN and

I. N. SMITH,

Attorneys for C. L. Boss and the Boss & Peake  
Automobile Company.

JOHN F. REILLY,

WINTER & MAGUIRE,

Attorneys for E. W. A. Peake.

Filed February 19, 1923. G. H. Marsh, Clerk.  
[348]

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AND AFTERWARDS, to wit, on Monday, the 19th day of February, 1923, the same being the 90th judicial day of the regular November term of said Court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [349]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Order Directing Exhibits to be Sent to Appellate  
Court.**

Based upon the stipulation of the parties hereto concerning the exhibits in this case, it is now,

ORDERED that the Clerk of the above court send the original exhibits introduced in evidence in the trial of the above cause to the Clerk of the U. S. Circuit Court of Appeals for the Ninth Judicial Circuit at San Francisco, California, and that such exhibits be forwarded at the time the record in the above cause is sent for filing.

Dated at Portland, Oregon, this 19th day of February, 1923.

CHARLES E. WOLVERTON,  
District Judge Who Tried Said Cause.

Filed February 19, 1923. G. H. Marsh, Clerk.  
[350]

---

AND AFTERWARDS, to wit, on the 21st day of February, 1923, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [351]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES,

Plaintiff,

vs.

BOSS & PEAKE AUTOMOBILE COMPANY, a  
Corporation, C. L. BOSS and E. W. A.  
PEAKE,

Defendants.

**Praecipe for Transcript of Record.**

To the Honorable George H. Marsh, Clerk of the  
District Court of the United States for the Dis-  
trict of Oregon:

You will please prepare a transcript on appeal herein, including the following papers, to wit: Judgment-roll herein, including the amended bill of complaint, the answer of the defendant E. W. A. Peake thereto, the answer of defendant Boss &

Peake Automobile Company, a corporation, thereto, the answer of defendant Charles L. Boss thereto and the pleadings between Charles L. Boss and E. W. A. Peake and all replies in said case to each answer; also the decree of the Court; also the certificate of the clerk.

Also include in the transcript the opinion of the Court in deciding the case; the transcript of the evidence settled as a statement of the case and the stipulations relative thereto, together with the order of the Court so settling such transcript; the stipulation and order concerning sending the exhibits to the clerk of the Appellate Court and not printing such exhibits.

Also the petition for appeal and order allowing the same; the assignment of errors; the bond on appeal and supersedeas bond and order approving such bond; the citation and acknowledgment of service; this praecipe and acknowledgment of service and the certificate of the clerk.

JOHN F. LOGAN and  
ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Company  
and C. L. Boss. [351½]



Due service of the foregoing praecipe admitted this 19th day of January, 1923.

THOS. H. MAGUIRE,

Asst. U. S. Attorney,

For Plaintiff.

JOHN F. LOGAN and

ISHAM N. SMITH,

Attorneys for Boss & Peake Automobile Company,  
a Corporation.

ROBERT F. MAGUIRE,

By W. G. SMITH,

Attorneys for E. W. A. Peake.

Filed February 21, 1923. G. H. Marsh, Clerk.  
[352]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,

District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, hereby certify that the foregoing pages numbered from 4 to 352, inclusive, constitute the transcript of record upon appeal in a case in said court in which the United States of America is plaintiff and appellee and Boss & Peake Automobile Company, a corporation, and E. W. A. Peake are defendants and appellees, and C. L. Boss is defendant and appellant; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and is a full, true, and com-

plete transcript of the record of proceedings had in said court in said cause in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$89.05 and that the same has been paid by the said appellant.

I return with the said transcript attached thereto the original citation in said cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Portland, in said district, this 22d day of March, 1923.

[Seal]

G. H. MARSH,  
Clerk. [353]

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[Endorsed]: No. 3996. United States Circuit Court of Appeals for the Ninth Circuit. C. L. Boss, Appellant, vs. The United States of America, Boss & Peake Automobile Company, a Corporation, and E. W. A. Peake, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed March 26, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

In the District Court of the United States for the  
District of Oregon.

No. L—8786.

February 26, 1923.

UNITED STATES

vs.

BOSS & PEAKE AUTOMOBILE COMPANY and  
C. L. BOSS and E. W. A. PEAKE.

**Order Enlarging Time to and Including March 28,  
1923, to File Record and Docket Cause.**

Now, at this day, for good cause shown, it is  
ORDERED that the time within which to file the  
transcript of record on appeal in the above-entitled  
cause and to docket the same in the United States  
Circuit Court of Appeals be and the same is hereby  
extended to and including March 28, 1923.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: No. 3996. United States Circuit  
Court of Appeals for the Ninth Circuit. Order Un-  
der Subdivision 1 of Rule 16 Enlarging Time to  
and Including March 28, 1923, to File Record and  
Docket Cause. Filed Mar. 2, 1923. F. D. Monck-  
ton, Clerk. Refiled Mar. 26, 1923. F. D. Monck-  
ton, Clerk.

In the  
**United States Circuit Court  
of Appeals**  
**For the Ninth Circuit**

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C. L. BOSS, Appellant,

vs.

THE UNITED STATES OF AMERICA, BOSS  
& PEAKE AUTOMOBILE COMPANY, a cor-  
poration, and E. W. A. PEAKE,  
Appellees

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**Brief of Appellant**

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Upon Appeal from the United States District  
Court for the District of Oregon

---

JOHN F. LOGAN,  
421 Mohawk Building, Portland, Oregon,  
and

ISHAM N. SMITH,  
600 Platt Building, Portland, Oregon,  
Attorneys for Appellant C. L. Boss.

THOS. H. MAGUIRE,  
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WINTER & MAGUIRE,  
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Attorneys for Appellee E. W. A. Peake.

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Case No. 3996

**In the  
United States Circuit Court  
of Appeals**

**For the Ninth Circuit**

---

C. L. BOSS, Appellant,

vs.

THE UNITED STATES OF AMERICA, BOSS  
& PEAKE AUTOMOBILE COMPANY, a cor-  
poration, and E. W. A. PEAKE,  
Appellees

---

**Brief of Appellant**

---

Upon Appeal from the United States District  
Court for the District of Oregon

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**STATEMENT**

The United States, as plaintiff, instituted suit to recover \$6,202.65, with interest and penalties, from Boss & Peake Automobile Company, a corporation, C. L. Boss and E. W. A. Peake, claiming such sum under the income tax law passed in 1917



as excess profit for the period from January 1, 1917, to June 1, 1917, during which the Boss & Peake Automobile Company was carrying out its corporate powers.

Appellee Boss filed pleadings admitting the amount of the government claim but contending that as between him and Mr. Peake that Peake should pay such sum because Boss had paid an equal sum and the unpaid balance was fifty per cent of the whole tax levied by the government.

The admitted facts are that the net assessable tax was \$12,405.30, of which Boss paid one-half. The real question in controversy is whether Mr. Boss or Mr. Peake shall pay the remainder.

The lower court (Judge Wolverton) filed a written opinion reported in,

United States v. Boss & Peake Automobile Co., et al., 285 Fed. 410 to 420,

which, though evincing care in preparation and intended fairness of expression, yet contains the errors of fact and resulting conclusions which will hereinafter be pointed out.

The opinion so filed was the basis of the decree from which this appeal is prosecuted (Tr. p. 57).

In addition to the foregoing the facts are briefly these:

The Boss & Peake Automobile Company was organized and incorporated on November 8, 1916, with a capital stock of \$30,000, divided into 300 shares, of \$100 each. Of these shares Boss subscribed 149, Peake 149, and W. H. Bietau 2. Subsequently Bietau assigned one of her shares to R. E. Murphy. Bietau was the secretary of Peake, and Murphy became the bookkeeper for the corporation. These two were, however, mere holding stockholders, for giving voice at the meetings of stockholders and directors; the real ownership being in Boss, 1 share, and Peake, 1 share. In reality, Boss and Peake were equal owners of the capital stock; each owning 150 shares, and each having paid into the concern as capital investment the full par value of his stock.

The corporation at once entered upon the business for which it was organized, and so continued to June 1, 1917, when, its assets were taken over by C. L. Boss Automobile Company.

About May 21, 1917, Mr. McCornaek, representative of the Hudson Motor Car Company, visited Portland, and, having ascertained that contention existed between Boss and Peake in their corporate affairs, expressed preference for Boss to represent their company as between Boss and Peake. This pronouncement was made at the Union Depot in

Portland, Oregon, by Mr. McCornack personally to Mr. Peake personally in the presence of Mr. Boss and Mr. McRell immediately prior to Mr. McCornack's departure for the east. Immediately thereafter a discussion was had between Boss and Peake at the Union Depot at Portland, Oregon, from which this controversy arose. Boss claims that at the discussion it was agreed that there should be a dissolution of the Boss & Peake Automobile Company and a distribution of its assets whereby he and Peake agreed upon an approximate equal division satisfactory to both, and that he, Boss, immediately accepted Peake's proposition. Boss is corroborated by Mr. McRell but Peake's version of the affair is that he simply sold his stock in the Boss & Peake Automobile Company to Boss.

The character of this transaction is determinative of this controversy.

At that time the income tax relation of corporations to the Government was under the law of 1916 and the war income tax of October, 1917, had not been enacted but when enacted in the latter part of 1917 was made retroactive to January 1, 1917.

The conversation at the depot was May 21st or 22nd, 1917, Thereafter, on May 31st, Mr. Peake, in order to carry out the agreement made at the depot, executed numerous documents hereafter referred to

and the transaction between him and Boss was actually closed at the First National Bank of Portland on June 1st, 1917, when Boss paid Peake \$26,-137.15 as per agreement and received from Peake the various documents which Peake had signed on May 31st.

Immediately thereafter and on June 1st, 1917, Boss and McRell repaired to the office of Mr. Logan—Boss' attorney—where an affidavit of assumed partnership name under the laws of the State of Oregon was signed and verified and at once filed of record with the proper recording authorities of the County of Multnomah.

Mr. Boss and Mr. McRell claimed, as above stated, that the agreement between Boss and Peake was for dissolution of the Boss and Peake Automobile Company and distribution of its assets and that Peake knew of the then pending formation of a partnership between Boss and McRell and aided in the dissolution and distribution by hastening the culmination of the transaction. Peake denies this, but on this point the court says:

(285 Fed. 416);

“Peake may have known, and must have known, that Boss and McRell intended forming a copartnership and taking over the assets of the corporation; but in this he was not concerned.”



Shortly after the culmination of the transaction on June 1, 1917, the Boss & Peake Automobile Company was actually dissolved and at the time of the passage of the Act of October, 1917, by Congress, the corporation had been out of existence several months.

The Appellee Boss claims that because the transaction between him and Peake was made for the purpose of and was in effect a dissolution of the corporation and a distribution of its assets, that Peake should pay the remaining one-half of the unpaid tax so levied as Boss has already paid one-half thereof.

By the opinion and decree appellee Boss was condemned to pay the balance of said tax, Peake was absolved from liability and thereby the Government was directed to recover its full tax from Boss.

## I.

### ERRONEOUS STATEMENT IN JUDGE WOLVERTON'S OPINION

Appellee<sup>art</sup> respectfully submits that the record supports his contention that Judge Wolverton erroneously stated in his published opinion:

1. (285 Fed. 412) "On or about May 21, 1917, Boss and Peake had an understanding

between them, *by which Peake was to dispose of his interest in the corporation to Boss.*”

The nature of the transaction, as we shall hereafter show, was in sharp controversy between Boss and Peake; the transaction by which Peake retired from the business is claimed by Boss to have been an agreement for dissolution of the corporation and distribution of its assets, whereas Peake claimed that he simply sold his corporate stock.

We shall discuss this phase of the controversy later.

2. (285 Fed. 413, Judge Wolverton said): “Boss further explains that, before meeting at the depot, the record was brought up, and showed a little over \$22,000 profit, and that, after deducting the *profit and loss on accounts unsettled*, would leave approximately \$20,000, one-half of which, namely, \$10,000, would be Peake’s share of the net profits,” etc. (italics ours).

The lower court correctly explained that the \$20,000 profit remained after—“deducting the profit and loss on accounts unsettled”—but throughout his opinion he seemingly failed to correctly understand this item.

As instance, at 285 Fed. 415 he says:

“The evidence shows that a balance of \$1, 373.32 was passed to surplus account.”

And again at 285 Fed. 415 he says:

“As to the item of \$22,746.64, representing the profits of the corporation, Mr. Boss says it was ‘divided and held in abeyance to find out how much interest McRell would take in the business,’ and as to the surplus of \$1,373.32, he says it was ‘credited to ourselves (meaning himself and McRell), because ourselves would absorb in the going business according to our percentages.’ He had reference to the percentages of capital each was to have in the co-partnership. Boss further testifies that Peake had nothing to do with the business of the new company after he sold out, ‘after he took his distribution.’ Peake testifies that he never requested that the corporation be dissolved, and had nothing to do with the organization of the C. L. Boss Automobile Company, and never had any interest in it.”

This item of \$1,373.32, was, as we submit, misunderstood by the trial court, as a reading of his opinion at 285 Fed. pp. 415-6-7 will disclose. This \$1,373.32 item is one-half of \$2,746.64, which was not distributed but was,

### *DEDUCTED PROFIT AND LOSS ON ACCOUNTS UNSETTLED*

We quote from Boss' testimony (pages refer to top paging of printed transcript) Boss says on

cross-examination by Mr. Reilly (pp. 186-187, et seq) :

“Q. Now, as a matter of fact, Mr. Boss, what was the value of the assets of the corporation on May 31st? Take whatever books you want, and tell us that. What book do you want?

A. I want all of them.

Q. All right.

A. Not counting the salaries, the books show a profit of \$52,746.64, of which \$2,746.64 was estimated current bills, service on automobiles, profit and loss on endorsements, the business liabilities of that present day, leaving the net profit after that statement of \$50,000—not net profit; net in the business.

Court: What are those figures you gave there?

A. As profit?

Court: Yes.

A. The profit was \$20,000.

Court: I know; but you gave figures there fifty thousand.

A. No, the amount in the business. As I understood, the amount in the business.

Mr. Reilly: The assets in the business. He said profits, but he meant assets.

A. Yes, if I said profits I meant assets.



Court: What is that asset?

A. \$52,746.64, of which \$2,746.64 was current liabilities.

Court: Yes, I understood that.

Q. Your profit and loss account in your ledger shows a profit of \$22,746.64? Is that right?

A. Yes, sir.

\* \* \*

A. That is what I said, without counting salaries here when I made the statement.

\* \* \*

Q. The profit shown on your books at that time was \$22,746.64?

A. Not taking into consideration the current bills, the service on the cars, the profit and loss on the notes that were indorsed that were out."

We, therefore, take the book assets as

shown .....	\$52,746.64
Deduct capital investment (capital stock) .....	30,000.00
	<hr/>
	\$22,746.64
Deduct estimated current liabilities....	2,746.64
	<hr/>
Net profit in business.....	\$20,000.00

Witness at pp. 191-2-3-4-5-6 testifies at length on this matter and we submit the effect of his testimony is that the current expense deductions aggregated \$2,746.64, which was disposed of as follows: one-half thereof—\$1,373.32—is in Boss' account because it belonged to Boss in the dissolution and distribution. The other half was never in Peake's account although it belonged to Peake. Boss says that by agreement this item of \$2,746.64 was deducted for current liabilities—that is, for accruing current expenses on the old business.

He claims that in carrying on the old business those current expenses arose because of service on cars that were sold by the Boss & Peake Automobile Company and because of losses on notes taken from automobile purchasers, which notes were discounted, and because of outstanding current bills not presented at the time of the dissolution and distribution.

Mr. Peake's one-half of this sum, \$1,373.32, was not credited to Mr. Peake as above shown but later, and after Boss and McRell conducted the business for one month, they saw that the \$2,746.64 current expense deduction so set aside was insufficient to pay such obligations. That is, was insufficient to pay the accruing contingent current expenses of the old unfinished business of Boss & Peake Automobile Company.

Thereupon the account was closed by crediting Peake's one-half of that \$2,746.64 fund (\$1,373.32) as follows:

To Boss .....	\$996.21	
To McRell .....	377.11	\$1,373.32

And thereafter the C. L. Boss Automobile Company (the partnership composed of Boss and McRell) absorbed the excess loss of the Boss & Peake Automobile Company (the corporation) arising from these current accruing losses on the unfinished old business of Boss & Peake Automobile Company.

The ultimate disposition, therefore, of the \$2,746.64 current expense item was as follows:

(a) To C. L. Boss in the dissolution and distribution agreement— one-half of said sum or.....			\$1,373.32
(b) Mr. Peake's one-half was ultimately credited,			
To C. L. Boss.....	\$996.21		
To R. J. McRell.....	377.11	1,373.32	
			<hr/>
			\$2,746.64

Our belief that Judge Wolverton misunderstood this item is supported by his opinion at 285 Fed. p. 415, reference to which with the ensuing pages sustains our position as we submit.

At 285 Fed. 415 Judge Wolverton says:

“The books and records of the Boss & Peake Automobile Company show that on June 1st the company gave to C. L. Boss its check for \$8,537.15. This was one of the checks deposited in the bank to the account of Boss, to enable him to draw the check of \$26,137.15 to the order of Peake. The book entries in the combined cash and journal show the following:

E. W. A. Peake, Cap a/c	\$15,000.00	
do Sal'y a/c .....		\$ 1,079.17
do for mahogany		
desk and chairs.....		57.98
do as earnings		
11/25 to 5/31.....	10,000.00	
C. L. Boss, by check, Cap. a/c.....		\$26,137.15”

With all due respect for the lower court—and we yield to none in our personal esteem and high regard for Judge Wolverton—we submit that his statement of Peake’s closing entries are out of balance. They should be:

E. W. A. Peake, Cap a/c	\$15,000.00	
do Sal'y a/c. ....	1,079.17	
do for Mah'y desk &		
chairs .....	57.98	
do as earnings 11/25		
to 5/31 .....	10,000.00	
C. L. Boss, by check, Cap a/c.....		\$26.137.15



And likewise, in considering Boss' closing entries on the dissolution and distribution agreement, Judge Wolverton says:

“In the journal is found this entry:

Profit & L. ....	\$10,000.00
do .....	11,373.32
Interest per agreement E.	
W. A. Peake .....	10,000.00
C. L. Boss, 1/2 profits ....	11,373.32

The evidence shows that a balance of \$1,-373.32 was passed to surplus account. It is further shown that the profits of the company on June 1st were \$22,746.64. \* \* \*

It is true that the book entry indicates the \$1,-373.32—which was Boss' one-half of the estimated accruing current expenses of the old business—is shown as a distribution of a profit, but when it is remembered that Boss claims that he agreed with Peake to take \$2,746.64 as an accruing current expense fund on the old business and to liquidate the accruing unknown expenses of such old business for items indicated above, then this \$1,373.32 is shown not to have been a profit as it was all absorbed and so was Peake's half of the \$2,746.64 item (\$1,373.32) also absorbed because the accruing current expenses of the old business were greater than the entire sum of \$2,746.64 set aside for that purpose.

We submit a careful reading of the opinion discloses that this misconception of this item greatly influenced Judge Wolverton in his decision.

Referring again to 285 Fed. 415, it appears that Peake received payments as follows:

(a) Capital stock .....	\$15,000.00
(b) Salary .....	1,079.17
(c) For desk and chair.....	57.98
(d) As earnings 11/25 to 5/31.....	10,000.00
<hr/>	
Total .....	\$26,137.15

The excess received over his capital and his earnings is \$1,137.15.

Now refer to Boss' closing account on the same page and we find this:

Profit & L .....	\$10,000.00
do .....	11,373.32
And against this the credit as follows:	
Interest per agreement E. W. A.	
Peake .....	\$10,000.00
C. L. Boss, 1/2 profits .....	11,373.32

It would appear, therefore, that the lower court was misled by the fact that Peake got \$10,000 only as his share of the profits whereas he regarded Boss as receiving \$11,373.32 as Boss' share of the profits, whereas, in truth and in fact, the \$1,373.32 received

by Boss at that time was one-half of the estimated current expense fund, as above shown.

## II.

### CLEARING ACCOUNT

The court says (285 Fed. 415):

“Other entries that throw some light upon the subject of controversy are: One in the ledger showing that the surplus account of \$1,-373.32 was passed, to C. L. Boss \$996.21, and to R. J. McRell \$377.11; and two in the combined cash and journal, of date June 19, 1917, the first a charge, ‘Clearing a/c, \$4,223.91,’ evidenced by check No. 2804; and the second, ‘Clearing a/c Tr. from B. & P. A. Co., to C. L. B. & Co. \$4,-223.91.’ The books of the Boss & Peake Automobile Company were not closed on June 1st, but were used by the C. L. Boss Automobile Company, and carried on as though there had been no suspension of business on the part of the corporation.”

Concerning this clearing account the records show witness Boss’ cross-examination, pp. 203-4 and at pp. 205, at seq the witness says:

(p. 205) “Q. That occurs in this combined cash and journal of the day preceding the entries relating to the charge to Mr. Peake of \$10,-000 and \$15,000 and salary, to which you referred in your direct testimony, doesn’t it?

A. The entry is entered the day previous.

Q. That is the entry of this charge against you and on account of the check given by the corporation is entered the day previous to these other transactions?

A. The transaction—

Q. Answer the question first, and then explain.

A. Yes, sir. The transaction was made the same day. Momentary occupation of the bookkeeper caused him to enter the other transaction a day later than when it took place.

Q. How do you know what momentary transactions the bookkeeper had?

A. Because it was carried into the balance as May 31st, part of the next day's transaction. The next day's transaction, the original entry of the salaries was entered a day too late. May 31st it was placed back in the final balance as of May 31st, and the books show it was entered June 2nd.

Q. Now, Mr. Boss, you were unable to explain to us a moment ago this clearing item, what that sum represented?

A. Yes.

Q. I called your attention to page 136, which is marked Peake's Exhibit 'D'. Now, let me call your attention to page 135 of the same



book, where this same item appears, and opposite it is found check No. 2804. Now can you tell us what that is?

A. No. I cannot. I don't see anything here that would say what it was for.

Q. It shows that check was written for the amount?

A. No.

Q. Doesn't it, isn't there the check number?

A. No; no.

Q. What is that column headed?

A. Yes, that is check number, yes.

Q. That shows that check was issued for that amount, does it not?

A. Yes, it would indicate that, yes.

Q. And page 136 shows that it was issued to the C. L. Boss Automobile Company from Boss & Peake Automobile Company, does it not?

A. That shows that it was charged to C. L. Boss Automobile Company.

Q. And shows that it came from Boss & Peake Automobile Company, does it not?

A. It indicates that from the bookkeeping here, yes, sir."

(Document introduced in evidence.)

Witness continues (p. 219):

“Q. Now, will you please turn to pages 135 and 136 of that combined cash and journal and refer to this item \$4223.91, being check numbered 2804, and state whether one of those entries is a debit and the other a credit—if so, state which is the debit and which is the credit—of the same item?

A. One is a credit and one is a debit.

Q. Which page is the credit and which is the debit?

A. The debit is 135 and the credit is 136.

Q. In winding up the old affairs of the Boss & Peake Automobile Company, and transferring the business and the assets over to C. L. Boss Automobile Company, were you doing that at the time and through the time that these entries were made in that part of June?

A. We were doing it continuously until all the old affairs were wound up. We might have had a note or something of that kind which would run for a long time; that is, an automobile might be sold on a note that we would have to take up. It would be a note indorsed by the Boss & Peake Automobile Company, and we would have to take it up. The date that all these old affairs were settled was indefinite; it was continued.

Q. Did you have to handle items as they came up from day to day, from time to time?  
(220)

A. Yes, sir."

Witness Weldy (Government witness) testifies at pp. 238, et seq concerning this matter and at pp. 239-240-241 he says:

"Q. Will you turn to page 136 of this journal, combined cash and journal, pages 135 and 136. I want to call your attention particularly to this check No. 2804 for \$4,223.91, that is marked clearing account, and on page 136 the same item appearing under the 19th as a clearing account transferred from B. & P. A. Company to C. L. B. & Company, \$4,223.91. I will ask you whether one of those items is a debit item and the other a credit.

A. They are.

Q. Which is the debit and which is the credit, Mr. Weldy?

A. The first item on page 135 is debit and on page 136 credit.

Q. From your experience in investigating corporate records and as an accountant, what is this account referring to when it says a clearing account?

A. That is hard to tell. It is usually the dumping ground for a number of things, to

close up the books at a certain period, or in between periods; and when we find that there is a debit and a credit closing the account we very seldom go into it.

Q. In examining the books of the Boss & Peake Automobile Company, in what condition did you find them?

Mr. Maguire: I don't see that that would be competent.

Court: Do you object to that?

Mr. Maguire: Yes, your Honor, I do.

Court: I think he has already testified.

Mr. Logan: I don't know that he has answered that question, your Honor.

Court: No, not that question, but I understood him to say he found them in very good form at some stage of his testimony.

Mr. Logan: I don't recall that, your Honor.

A. I think I did. I think I made that statement, your Honor, yes, sir.

Cross-examination resumed.

Q. In this matter of clearing account, Mr. Weldy, that shows that there was a check written, doesn't it?

A. Yes, sir.

Q. It doesn't show what the check was written to, does it?

A. No.

Q. But when you turn over the page here, that explains the transaction, doesn't it?

A. Yes, it appears so. There is more explanation of the credit than there is of the debit.

Q. Now, I want to ask this question: Isn't that where they had taken the money out of the bank account of Boss & Peake Automobile Company and put it over there to the bank account of C. L. Boss Automobile Company?

A. I would not attempt to say it was. That is up to the bookkeeper.

Court: I want to ask a question. Why does one of those entries appear on the debit side and one on the credit side?

A. I think, your Honor, just as it states there, it is a clearing account for a number of items that have probably come up during the closing of the corporate period, corporate existence. They frequently come up, and then they issue a check to cover it or close it out in some other way. Now, the bookkeeper is the only one that can answer that. I am not competent.

Q. But when you have a clearing account that is a matter of clearing off the books, that does not involve any issuance of any checks, does it?

A. Oh, it might; it might.



Q. You didn't investigate that to trace down the history of that?

A. No, I didn't.

Q. Very well, sir, I won't further examine you, then."

Mr. Murphy, the bookkeeper, testifies concerning this same account at page 327.

"Q. Now, Mr. Murphy, I want to call your attention to the combined cashbook and journal for the month of June, being page 135, and to an entry appearing therein under date of June 19, 1917, and particularly to check 2804, \$4223.91, bearing this legend 'Clearing account.' Will you explain to the Court what that transaction was, and when it took place?

A. That was the date of the transfer, and represented the balance in the bank of the Boss & Peake Automobile Company, which at that date was being deposited to the C. L. Boss Automobile Company.

Q. The C. L. Boss Automobile Company was the partnership of Boss and McRell?

A. Yes.

Q. Now, will you state whether or not prior to the 19th of June the funds of the business were deposited and kept in the Boss & Peake Automobile Company bank account?

A. Yes, up to June 19th."

There is no evidence showing that this \$4223.91 arose from the old business. The old books of the Boss & Peake Automobile Company were used by the C. L. Boss Automobile Company in carrying on its new business—as well as in the closing of the old affairs of Boss & Peake Automobile Company.

The bank account of the C. L. Boss Automobile Company (the Boss-McRell partnership) was carried at the First National Bank of Portland in the name of the Boss & Peake Automobile Company until June 19, 1917.

Keeping in mind that the month of June is a period of the year when automobiles show an increased purchase and use in the Pacific Northwest and that the partnership of Boss & McRell was in operation from June 1 to June 19, this \$4223.91 is easily accounted for as coming from the business of the C. L. Boss Automobile Company.

The evidence is conclusive that C. L. Boss Automobile Company (copartnership between Boss and McRell) filed its affidavit of assumed name, as required by law, on June 1, 1917, and from that time it transacted the new business. It is further beyond dispute that the only business of the old corporation—that is Boss & Peake Automobile Company, transacted after May 31, 1917, related to the accru-

ing, unsettled, contingent liabilities, as above shown, and that the C. L. Boss Automobile Company (the copartnership) continued using the old books of the Boss & Peake Automobile Company.

Mr. Murphy, bookkeeper, testifies at p. 329:

“Q. Now, Mr. Murphy, was there any change at all made in the manner in which the business was carried on and the books were kept, between the operations of the Boss & Peake Automobile Company and the C. L. Boss Automobile Company?

A. No.

Q. Did you have any instructions to make any changes in the method of keeping books or the manner of transacting the business on June 1st, or immediately thereafter?

A. No.”

In the light of this testimony we submit there is no adverse criticism of Boss' business, predicated upon this clearing account.

### III.

#### COPARTNERSHIP USED THE CORPORATION'S OLD BOOKS

The opinion says (285 Fed. 415):

“The books of the Boss & Peake Automobile

Company were not closed on June 1st, but were used by the C. L. Boss Automobile Company and carried on as though there had been no suspension in the business on the part of the corporation.”

Boss’ testimony hereafter quoted shows that in the dissolution and distribution between him and Mr. Peake, it was agreed that Boss should take the other assets of the company and hence these books were his after the transaction with Mr. Peake. They became his by reason of the dissolution and distribution between him and Mr. Peake.

The old business of the Boss & Peake Automobile Company ended, except that the books had to be used to get the assets which Boss received in the dissolution and distribution and to get the proper proportion of the accruing current expense fund of \$2,746.64, properly chargeable to Boss and McRell, respectively.

It seems that the form of bookkeeping has confused his Honor, Judge Wolverton, whereas, as we shall hereafter show, the courts regard the substance and not the form of the bookkeeping.

#### IV.

At 285 Fed. p. 418 the court says:

“It is a matter of moment, also, that the stock had a value beyond the mere book value

of the assets of the corporation. The enterprise had proven to be profitable. On an investment of \$30,000, the company had earned more than \$22,000 in five months, and the good will must have been of considerable worth. Peake gave up his interest in this when he parted with his stock."

We respectfully submit that Peake's testimony at pp. 287 to 309 shows his intimate acquaintance with the value of the business, with its profit-making power and with each item of its affairs.

Concerning the value of this good will Peake states as follows (p. 308):

(Referring to the time of the conversation at the depot on May 21, 1917) "Q. At that time you had in mind the condition of the business, didn't you?

A. I had a general knowledge of the business, yes.

Q. What else did you take into consideration in fixing the value of your stock, other than its original capital value and the \$10,000 dividends?

A. Well, it was a pretty good business, making about \$5,000 a month.

Q. How much?

A. About \$5,000 a month at that time; between \$4,000 and \$5,000.



Q. And you charged nothing for that?

A. I didn't get very much for it, no."

Although this testimony of Peake's admits that he had this alleged good will in mind when he fixed his sale price as he claims, at the depot on May 21, 1917, yet the lower court seems to regard this good will as having some remarkable value over and above the price paid Peake in the dissolution and distribution agreement.

Now concerning this alleged value of this pretended good will we submit that the record is conclusive on the following facts:

(a) When Boss and Peake formed the Boss & Peake Automobile Company (the corporation) each subscribed and paid in cash for \$15,000 of the par value of the stock, making their capital investment \$30,000.

(b) At that time it was understood that Peake was to be, and throughout their relations in the corporation he did sustain the position of the financial man.

(c) At the organization of the corporation (Boss & Peake Automobile Company) it was understood that Boss was to be the salesman or the executive head of the business.

(d) Boss had the Hudson contract in his old partnership before the corporation was formed.

(e) Boss took the Hudson contract and Boss' ability as a salesman into the corporation.

(f) The ability to sell the automobiles was that of Mr. Boss and not that of Mr. Peake and the right to sell the Hudson cars was a franchise which was not transferable or assignable in the commercial world.

(g) Boss claims that the Hudson contract has no commercial value as such; that the contract is not negotiable; that it is a right only; and that the value of that contract depends upon the ability of the salesman who handles it; that the contract itself has no assignable or transferable commercial value.

(h) When Boss went into the corporation he paid cash for his stock and so did Peake. Mr. Boss was not allowed a thing for the good will of the Hudson contract nor for its alleged pretended commercial value. It had no such value then and neither did it have any such value six months later when he and Peake quit.

(i) Peake did not take any good will into the Boss & Peake Automobile Company—he took financial ability and cash—and when the dissolution and distribution took place Boss took his salesman ability and the Hudson contract and Peake took his money and his profits and they parted company.

(j) And on this same June 1, 1917, when Boss made the payment to Peake, Mr. Boss immediately went to Mr. Logan's office and there he and Mr. McRell made the affidavit of assumed name of C. L. Boss Automobile Company—the partnership between Boss and McRell—and that partnership entered upon the business of selling Hudson automobiles.

(k) Furthermore, in the talk at the depot on May 21, 1917, between Mr. McCornack, representative of the Hudson Motor Car Company, and Mr. Peake and Mr. Boss, Mr. McCornack told Mr. Peake that as between him and Boss the company chose Boss. This Hudson contract was a bone of contention between Boss and Peake. Peake tried to deprive Boss of the contract knowing that if the contract was cancelled the pretended good will of the Boss & Peake Automobile Company went with it.

(l) Peake knew that the Hudson Company chose Boss instead of him. That company thereby notified Peake that the Boss & Peake Automobile Company had no good will in that Hudson contract—hence, Peake's testimony as above quoted.

(m) This case was called for trial May 22, 1922, at 2 p. m., and its trial was continued May 23rd and 24th (Tr. p. 73).

(n) During the trial a fatal illness occurred in the family of Mr. Logan and the case was adjourned on May 24th, 1917 (Tr. p. 73, also 322), and was resumed again on July 7th, 1922, at 10 a. m. (Tr. p. 73, also 322).

(o) From May 24th to July 7th is approximately six weeks. Boss' testimony had been given. His claim that the Hudson contract had no assignable commercial value—that its value depended upon the ability of the salesman—was well known, and, although Mr. Peake and his attorneys had six weeks' time to rebut Boss' testimony, there is not a single automobile man of any standing that was called to the stand to dispute what he said on that point.

(p) As illustrative that the good will of the automobile business depended upon Boss' ability as a salesman and the mere franchise from the corporation, let us suppose that at the dissolution and distribution Mr. Boss had withdrawn and Mr. Peake had tried to continue in business with McRell—as McRell says he did want to do; it is settled that the Hudson Motor Car Company representative (Mr. McCornack) told Peake that the company chose Boss as against him, and thereupon Peake and Boss had the conversation immediately at the depot in Portland.

If Boss had retired he would have taken that

contract and his own salesman ability with him and how much good will would there have been left for Peake and McRell in their partnership which Peake clandestinely attempted to form with McRell some time in the early part of the year?

(q) Again let us suppose that the dissension between Boss and Peake had resulted in a receivership for the Boss & Peake Automobile Company. Suppose that Boss had severed his connection with the company and started in the automobile business alone.

As between Boss, individually, and the receiver of the Boss & Peake Automobile Company, is it not plain that the Hudson Motor Car Company would have cancelled the Boss & Peake Automobile Company contract and made a new contract with Boss, and such contract being the alleged good will, would leave nothing known as good will in the company.

We respectfully submit that the alleged good will arising from the Hudson contract and Boss' salesmanship was not property that could or would pass either to a receiver or that could or would be assignable in a mercantile transaction and that the lower court was confused by attributing considerable worth to the alleged good will of the business conducted by the Boss & Peake Automobile Company.



In view of these facts we respectfully urge that the lower court's remarks imputing a value to this good will are beyond the record.

The question of good will, with the other matters above pointed out, seem to enter largely in the court's consideration of the merits of this case and we respectfully submit that they influenced his judgment erroneously as we claim and as we shall hereafter attempt to show.

## V.

The court below further says (285 Fed. 420) :

“Another circumstance is that Boss borrowed \$8,537.15 from the corporation on his note, and with this paid Peake, in part, the consideration for which he sold his stock.”

We respectfully submit that there is no evidence whatsoever sustaining this statement. Mr. Boss never gave his note to the Boss & Peake Automobile Company for any sum whatsoever.

In raising the money with which to pay Peake the \$26,137.15 Boss raised it in the following manner :

- |     |  |             |
|-----|--|-------------|
| (a) | He borrowed from the Western<br>Bond & Mortgage Company....\$ 8,000.00<br>and gave his note and mort-<br>gage therfor; |             |
| (b) | Peake loaned, as the evidence<br>shows .....   | 9,600.00    |
| (c) | Boss took check from the Boss<br>& Peake Automobile Company  | 8,537.15    |
|     |  | \$26,137.15 |

We direct opposing counsel's attention to this misstatement in the opinion and ask them to say whether they will defend the Judge's statement that Boss gave his note to the Boss & Peake Automobile Company.

The facts are stated by Boss in telling of the agreement made between him and Peake at the depot as follows:

(Tr. pp. 127-8-9)

“Q. Tell how that came up, and tell us all about the conversation with him then at the time he refers to.

A. Mr. McCornack, the Field Manager of the Hudson Motor Car Company, made a trip here to the coast, and during Mr. McCornack's trip Mr. Peake came to the depot and met Mr. McCornack in the presence of Mr. McRell and myself. And while there at the depot Mr. Peake made overtures to Mr. McCornack to get the

Hudson contract, and Mr. McCornack asked Mr. Peake what he did in the business; and after Mr. Peake had explained, he said, 'I understood you to be a financial man, and as a financial man I think your time would be worth more than what you have done in the business.' And Mr. Peake made representations, and Mr. McCornack said that if Mr. Peake quarreled with me he would not be quarreling with me, he would be quarreling with the Hudson Motor Car Company. After Mr. McCornack left to board the train, I turned to Mr. Peake and I said that I noticed that he was blocking our distribution, our dissolution and distribution again, and he said, 'How so?' I said, 'By taking the cash of the corporation and putting it in notes that the bank was carrying'; and Mr. Peake said, 'I will take notes, title notes on all the new Hudson cars, so that the distribution and dissolution can be completed. I will take the physical assets. I will take the automobiles of the corporation, and sell them to you boys, and take the title notes, and loan you boys the money on the very automobiles so that the dissolution and distribution can be completed.'

Q. At that time what other thing was said, if any, as to how you would arrive at what sum he should be paid?

A. Mr. Peake said, 'In doing so I must have my salary; I must have my capital, and I must have my net profit, which I estimate—the

net profit I estimate to be \$20,000 after allowing over \$2,000 for profit and loss on the notes that were indorsed, the service on the cars that were out, and the incidental bills that were not in. Experience had taught us by keeping record of the business constantly—

Mr. Reilly: Objected to, as the voluntary statement of the witness is not responsive to the question; merely argumentative; not a statement of any fact.

Court: Just answer the question.

Q. You state, Mr. Boss, that he asked for his salary, his capital and his net profits.

A. His estimated net profits.

Q. You have already told about the cars. Now what about this salary. How was that arrived at, and in what way had it been carried on the books, if at all?

A. Mr. Peake had had Mr. Murphy credit himself and myself a salary.

Q. How much?

Court: Who was Mr. Murphy?

A. Our bookkeeper. It was not authorized by the corporation; had never been authorized; and I wanted to draw my salary, and because it was not authorized by the corporation I felt as if I could not draw it."

And again at p. 130:

Q. Did you agree to that with him, to allow the salary?

A. At the depot.

Q. At the depot; in this settlement and distribution?

A. His proposition that he put forth was accepted; and at the time that it was put forth I said, 'As of June 1st.' This was May 21st.

Q. 31st, wasn't it?

A. No, the proposition made at the depot was May 21st; either May 21st, May 22nd, or May 23rd; and in checking back and looking at the calendar I think it was May 21st.

Q. Anyway, you accepted the proposition that he made?

A. Yes, sir."

And from pages 129 to 144 Mr. Boss testifies in extenso concerning the agreement at the depot and at page 144 he says:

"Q. Now, you stated what Mr. Peake took in this dissolution and distribution. What became of the balance of the assets of the Boss & Peake Automobile Company? Who got that?

A. The division would go to me; and I would have the liabilities and the assets of what was left after he had his capital, his net profits, and his salary. I would have mine in the stock and the accounts and the liabilities.



Q. What do you mean, stock in trade?

A. In merchandise."

Boss' version of the affair is corroborated strongly by Mr. McRell, and, while it is true that Peake disputes their version, yet the lower court found with Mr. Boss on the transaction at the depot because the court says (285 Fed. 416):

"Boss and McRell agree in all material particulars as to the understanding reached at the depot. Peake discloses an entirely different arrangement. Standing alone, and according to the witnesses full credibility, Boss would have the preponderance of the evidence in his favor."

Here, then, the court finds that so far as the conversation at the depot is concerned—that is the actual agreement made between the parties—the evidence preponderates in Boss' favor.

The evidence shows that Peake took:

- (a) The 8 new Hudson automobiles;
- (b) His capital investment of \$15,000;
- (c) His one-half estimated profits—\$10,000;
- (d) His back salary—\$1079.17, and
- (e) The value of his mahogany desk and chairs—\$57.98.

The evidence also shows that the remainder of the assets fell in the distribution to Mr. Boss.

This means then that of the physical assets Peake took the automobiles and Boss took the cash and that the \$8,537.15 cash which Boss took from the Boss & Peake Automobile Company account was his by reason of the dissolution and distribution.

He never gave any note for it and the court's statement that he did give a note for it aptly illustrates the misconception of this case which his Honor had.

## VI.

### THE EIGHT AUTOMOBILES

At the time of the dissolution and distribution the Boss & Peake Automobile Company had eight new Hudson cars.

Boss testifies that at the conversation at the depot it was agreed Peake should take these cars. He is corroborated by McRell and contradicted by Peake, but the lower court found that the evidence on the conversation at the depot preponderated in Boss' favor. Boss' testimony concerning these eight automobiles is found in the record at pp. 128 to 144, et seq., and on cross-examination he adhered to his statements.

He says that in the dissolution and distribution agreed upon on May 21st or 22nd, 1917, Peake actu-

ally took the eight new Hudson automobiles, etc., and that he (Boss) would get the remainder of the assets as heretofore shown.

We cite this testimony now to show that Peake did actually take the physical assets of the company.

## VII.

### EQUAL DIVISION OF ASSETS

The opinion says (285 Fed. 417) :

“There was never an inventory of the assets made, and, of course, Peake never had any knowledge of such, nor any hand or part in it. \* \* \* (below the middle of page). Nor was there an equal division of such assets. There was never an inventory made up of the entire assets, brought down to the date of the culmination of the transaction, and the parties did not deal with reference thereto when they closed their negotiations.”

While it may be that no formal inventory was ever made, yet, as we submit, the record discloses that Peake knew intimately the whole affairs of the corporation. His testimony on cross-examination from pp. 287 to 322 shows :

“Q. Did you have any talk with Mr. Boss about your getting out of the corporation?

A. Why, yes, away back in March.

Q. Did you have any other conversation with him between March of 1917 and June 1, 1917, about your getting out of the corporation?

A. Nothing to amount to anything, only asking when he would be able to be in a position to buy.

Q. You asked him when he would be in a position to buy?

A. Yes.

Q. Did he tell you the condition of his finances?

A. Possibly. I don't particularly remember.

Q. During that time, between March, 1917, and June, 1, 1917, you had full access to the books of your own corporation, didn't you?

A. Yes.

Q. Have any trial balances?

A. Yes, Mr. Murphy got out a trial balance.

Q. How many trial balances did you have?

A. I do not know.

Q. Several, didn't you?

A. I wouldn't even say that, I think there were several.

Q. Several?

A. Yes.

Q. How frequently did Mr. Murphy give you trial balances?

A. That I couldn't tell you.

Q. When he got out those trial balances, didn't he give a copy to you for your desk, and one to Mr. Boss for him, for his information?

A. No, sir."

Witness then tells about the trial balances (p. 290); that he looked over them and that either he or Boss could refer to the trial balance if they wished; and says:

"Q. Did you talk with Mr. Boss about how affairs were getting on?

A. We were always well satisfied as to the money-making part of the business.

Q. Both you and Mr. Boss were well posted as to the condition of the business?

A. Fairly well posted, I think.

Q. You knew the latter part of May, 1917, you knew about what you had made, didn't you? You knew the profits?

A. In a general way.

Q. What were they?



A. Well, I know now. I didn't know at the time.

Q. Oh! You examined those trial balances, and you didn't know what profits you were making? Is that right?

A. Yes, because the trial balance had not been made out in June or May.

Q. When was it made before that?

A. It might have been made in—I don't know; it wasn't made at the time I went out.

Q. Didn't you say a moment ago that you had several trial balances between March and June?

A. Between March and June?

Q. Yes.

A. No; from the time I went in.

Q. From the time you went in?

A. Yes.

Q. How many trial balances did you have from November, 1916 up to June 1, 1917?

A. I do not know.

Q. Did you have more than one?

A. I would fancy all I could remember would be two or three.

Q. Did you have one every month?

A. I do not think so.

Q. When will you say you got those two or three trial balances?

A. I don't know.

Q. But you did have two or three?

A. Yes, there were two or three made out.

Q. How near to June 1, 1917, did you have a trial balance made?

A. That would be impossible for me to say. I don't know. Mr. Boss has the trial balances; he should produce them.

Q. Did you, in addition to the trial balances, have access to the books?

A. Certainly.

Q. You knew about how the sales accounts were going?

A. Yes.

Q. And you knew that in your books you had a separate record of each car that was sold, showing specifically the items of expense, the first cost, to whom sold, the amount received, and the profit, didn't you?

A. Yes.

Q. So you knew about what the profits were?

A. In a very general way.

Q. Well, what were they? What was your knowledge?

A. My knowledge is not very definite. I had an idea what the business was doing. That was all."

It is, therefore, plain that Peake had the affairs of the business fairly in mind at all times. In fact, the court in its opinion says (285 Fed. 412):

"The parties were business men, were keenly alive to the promotion of the enterprise, and kept fairly in mind the probable earnings of their investment as the business proceeded."

This being true, it seems hardly material that there was not a technical inventory made at the time of the dissolution and distribution.

Both Mr. Boss and Mr. Peake had equal access to the books, Peake was the financial man and his business training would make him study the financial condition closer than Boss would study it, so that when the question came up on the division of the affairs Peake, having been informed by Mr. McCornack that the Hudson Motor Car Company preferred Boss to him, made the proposition at the depot for dissolution and distribution as Boss outlined in his testimony, which Boss immediately accepted.

The assets of the corporation, as shown by the books, were at that time \$52,746.64. This sum was made up as follows:

(a) Capital investment.....	\$30,000.00
(b) Profits .....	22,746.64
	<hr/>
	\$52,746.64

And the profits—so-called—\$22,746.64—were again separated so that the fund for payment of accruing current expenses of the old business—\$2,746.64—was deducted from the \$22,746.64, so-called profits, leaving the unquestioned net profit of \$20,000 to be divided equally between Boss and Peake.

As the parties themselves made this settlement upon this basis at the depot and because the testimony preponderates in Boss' favor, as the lower court held, respecting the conversation at the depot, the question of whether there was an exact equal division of the assets and profits becomes academic.

## VIII.

PEAKE'S TRANSACTIONS OF MAY 31, 1917  
At 285 Fed. 414, the court says:

“On May 31, 1917, Peake tendered to the board of directors and stockholders of the Boss & Peake Automobile Company his resignation as secretary and treasurer and director of such

company. On the same day, at a stockholders' meeting, at which were present C. L. Boss, representing 298 shares; R. J. McRell, 1 share, and R. E. Murphy, 1 share, his resignation was accepted, and McRell was elected director in his stead. On June 1, 1917, Boss and McRell filed with the county clerk and ex-officio recorder of Multnomah County a certificate declaring that they had entered into co-partnership under the assumed name of C. L. Boss Automobile Company."

We believe the court is mistaken on this date. It is true Peake's resignation was dated May 31st—that his transfer of the stock purports to have been made on May 31st—that the documents signed purport to have been executed May 31st, but all the witnesses agree that Peake turned over these documents at the First National Bank on June 1st. Peake testifies as follows (Tr. pp. 303-4):

"Q. When was it you gave the stock over to Mr. Boss?

A. I gave it to him at the time he gave me the check.

Q. At the same place?

A. Yes.

Q. In the First National Bank of Portland?

A. Yes.



Q. When was your resignation as an officer of the Boss & Peake Automobile Company written out, do you know?

A. Well, my impression is that it was made and given to him at the same time he got the stock.

Q. I will show you now this document—the pages are unnumbered—it is in the record book of the Boss & Peake Automobile Company; purports to be.

Mr. Reilly: It is part of the sheets introduced in evidence.

Mr. Smith: All right.

Q. Purporting to be your resignation. Is that right?

A. Yes.

Q. What is the date of it, please?

A. . May 31st.

Q. May 31 is written in typewriting above, isn't it?

A. Yes.

Q. It is also written in pen down here at the bottom, where the blank was left to fill in the correct date with the pen, wasn't it?

A. Yes.

Court: Both those dates are May 31st, are they?

Mr. Smith: Yes, your Honor; typewritten one at the top, and one at the bottom is May 31st also.

Court: That was prior to this transaction at the bank?

Mr. Smith: The day before.

A. Well, I prepared my resignation that day, and delivered it to Mr. Boss at the bank."

And his further testimony at pp. 305-6, et seq, sustains this statement.

Boss testifies at pp. 143-4:

"Q. Now, on this same day of June 1st, 1917, what transaction, if any, did you have with Mr. Peake about a \$9,600 advance from him to C. L. Boss Automobile Company?

A. In following out this offer and the acceptance of the offer to dissolve and distribute, he took all the new Hudson automobiles.

Q. How many in number?

A. Eight; and took title notes on them;  
\* \* \* (p. 144).

\* \* \*

And then following that time I walked right over to Mr. Logan's office with Mr. McRell and signed that statement of the C. L. Boss Automobile Company under assumed name at that very minute."

## ASSIGNMENTS OF ERROR

Upon this appeal the appellant relies upon the errors designated in the transcript at pp. 61-3, to-wit:

## I.

The court erred in holding and deciding that C. L. Boss was responsible to and should be decreed and was decreed to pay to the plaintiff the remaining unpaid portion of the tax involved in this controversy with interest and penalties, and in decreeing that the said C. L. Boss be required to pay to the plaintiff any sum whatsoever of the amount involved herein.

## II.

The court erred in not holding and deciding that the defendant E. W. A. Peake was and is responsible to the plaintiff, and as between him and C. L. Boss the said E. W. A. Peake was and is responsible and should be decreed to pay the remaining unpaid portion of the tax, with interest and penalties, involved in this case.

## III.

The court erred in not holding and deciding that C. L. Boss should be absolved and freed from any and all claims of the government involved in this controversy.

## IV.

The court erred in rendering decree against the said C. L. Boss for any sum whatsoever and in not rendering decree against the said E. W. A. Peake as prayed for in Boss' pleadings, upon the ground that the evidence introduced upon the trial entitled the plaintiff to recover from the said E. W. A. Peake and as between E. W. A. Peake and C. L. Boss entitled such recovery by plaintiff against E. W. A. Peake alone.

## V

The lower court committed error upon the whole record in holding that C. L. Boss was not entitled to the relief sought for in his pleadings.

## VI.

The lower court committed error upon the whole record in dismissing the bill as to the said E. W. A. Peake, and in holding and deciding that the transaction between Boss and Peake was a sale of Peake's stock to Boss and was not a dissolution and distribution agreement.

Appellant relies upon the following

## POINTS AND AUTHORITIES

## POINT I

The income which is subject to taxation in this case is defined as,

“ ‘The gain derived from capital, from labor or both combined,’ provided it be understood to include profits gained through sale or conversion of capital assets.”

Eisner v. Macomber, 252 U. S. 189; 40 S. C. 189; 9 A. L. R. 1590 (note),  
is quoted approvingly in,

Merchants Loan & Trust Co. v. Smietanka,  
255 U. S. 509; 41 S. C. 386 at 388,  
and applied to Act of October 3, 1917, in  
LaBelle Iron Works vs. U. S. 256 U. S. 377;  
41 S. C. 528 at 530, Points 1-2-3.

## POINT II

It is upon the “income” falling within the definition last given that the tax in question is levied.

LaBelle Iron Works vs. U. S., 256 U. S. 377,  
41 S. C. 528;  
and explained generally in Eisner vs. Macomber,  
*supra*.

The definition was adopted and applied to the income tax of 1916 in,

Goodrich v. Edwards, 255 U. S. 527; 45 S. C. 391.



This interpretation finds support in,

U. S. v. McHatton (Mont. D. C.), 266 Fed. 602;

Bulletin No. 1-21, Income Tax Rulings, p. 10, relating to dissolution of corporation and distribution of its assets, says:

“Where a corporation dissolves and distributes all of its assets prior to the time the list carrying an assessment of additional tax against the corporation comes into the hands of the collector, the tax is not collectible upon notice and demand followed by distraint, but may be recovered only by means of a suit instituted against the stockholders or other persons who may have received the corporation’s assets, except bona fide purchasers for a valuable consideration and creditors.”

Income Tax Rulings Cumulative Bulletin from April 1, 1919, to December 31, 1919, at p. 251, Sec. 250, Art. 1008, says:

“Collection of Tax by Suit:

If a corporation in process of dissolution does not reserve sufficient funds to pay any income tax assessed against it, the liability for the amount of tax remaining unpaid attaches to the individual stockholders, and if necessary legal proceedings may be instituted against them for collection of the tax.”

## POINT III

The tax follows the income and in case of a dissolved corporation, those who have received the assets of the corporation, either as dividend or otherwise, upon such dissolution, are liable for the income tax pro rata.

(1) The assets of a corporation, if its debts are not paid before dissolution, become a trust fund chargeable with the debts of the corporation.

Wood v. Dummer, 3 Mason 308, Fed. Case No. 17,944.

Mumma v. The Potomac Co., 8 Pet. 281.

Marr v. The Bank of West Tennessee, et al., 4 Cald. 471, 479.

Railroad Co. v. Howard, 7 Wall 392, 410.

Wabash, St. Louis & Pacific Ry. Co. v. Ham, 114 U. S. 587, 594.

Pierce, et al. v. U. S., 41 Sup. Ct. 365.

U. S. v. McHatton, 266 Fed. 602.

People v. National Trust Co., 82 N. Y. 282.

Marshall v. People of State of New York, 41 Sup. Ct. 143.

First National Bank of Houston, et al. v. Ewing, et al., 103 Fed. 168.

(2) The stockholders' liability is several, and may be enforced against one or more of the stockholders to the extent of the distributive share of the corporate assets actually received.

Pierce, et al., v. U. S., 41 Sup. Ct. 365.

U. S. v. McHatton, 266 Fed. 602.

Fidelity Trust Co. v. D. F. McKeithen Lumber Co., 212 Fed. 229.

Garrow, et al., v. Fraser, et ux., 167 Pac. 75.

Martin v. City of Lexington, 210 S. W. 483.

McLeon v. Moore, 145 S. W. 1074.

Hastings v. Drew, 76 N. Y. 9.

4 Thompson on Corporations, 2nd Ed., Sec. 4926.

Fricke v. Augemier, 101 N. E. 329.

Fletcher on Corporations, Vol. 8, p. 9217.

(3) The equity trust fund doctrine which thus permits a creditor to follow the assets of the corporation has been recognized many times in Oregon and was recently applied in,

Gantenbein v. Bowles (decided January 19, 1922), 203 Pac. 614, at p. 619, Point 7.

#### POINT IV

Upon general principles equity disregards the

form and considers only the substance of a transaction, not alone in general business affairs, but in administering this income tax as well.

Eisner v. Macomber, 252 U. S. 189; 41 S. C. 189, at 195, Point 12, says:

“We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder’s right in order to ascertain whether he has received income taxable by Congress without apportionment.”

The point that equity will look beyond the devices used to cover the real nature of the transaction and treat it as it really is has been applied by the Oregon Supreme Court in,

Burke v. Hindman, 56 Ore. 545, at p. 550.

## ARGUMENT

The transactions at the depot and the agreement there made between Boss and Peake, together with the acts of the parties to the final dissolution of the corporation, support the contention of appellee Boss that the agreement at the Union Station at Portland was one for the dissolution of the corporation and the distribution of its assets.

Because, therefore, both Boss and Peake each

received the actual assets of the Boss & Peake Automobile Company in carrying out the dissolution and distribution agreement, and because the partnership of Boss and McRell, under the name of the C. L. Boss Automobile Company, was formed and became effective as of June 1, 1917, the exact date of closing the contract between Boss and Peake, and because within a few weeks thereafter the Boss & Peake Automobile Company was actually dissolved by legal form, the tax in question, as we submit, should follow the assets so taken as the distributive share of both Boss and Peake equally.

Boss has paid his one-half and Peake, having received his estimated one-half of the division, should be held to pay the other half—that is the unpaid balance due the government as heretofore stated.

Applying the law to these facts, we find these rules laid down by the Federal Supreme Court in

Eisner v. Macomber, 252 U. S. 189; 40 S. C. 189,

at p. 183, Point 6, the court repeats its former definition of income, and says:

“ ‘Income may be defined as the gain derived from capital, from labor, or from both combined,’ provided it be understood to include profit gained through a sale or conversion of



capital assets, to which it was applied in the Doyle Case, 247 U. S. 183, 38 Sup. Ct. 467, 469 (62 L. Ed. 1054).

Brief as it is, it indicates the characteristic and distinguishing attribute of income essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'Gain,' which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived. 'Derived—from—capital'; 'the gain—derived—from—capital,' etc. Here we have the essential matter; not a gain accruing to capital; not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value, proceeding from the property, severed from the capital, however invested or employed, and coming in, being 'derived'—that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal—that is income derived from property. Nothing else answers the description.

The same fundamental conception is clearly set forth in the Sixteenth Amendment—"incomes, from whatever source derived"—the essential thought being expressed with a conciseness and lucidity entirely in harmony with the form and style of the Constitution."

At the bottom of the same page the court proceeds (referring to a stockholder):

“Short of liquidation or until dividend declared, he has no right to withdraw any part of either capital or profits from the common enterprise; on the contrary, his interest pertains not to any part, divisible or indivisible, but to the entire assets, business, and affairs of the company. Nor is it the interest of an owner in the assets themselves, since the corporation has full title, legal and equitable, to the whole. The stockholder has the right to have the assets employed in the enterprise, with the incidental rights mentioned; but, as stockholder, he has no right to withdraw, only the right to persist, subject to the risks of the enterprise, and looking only to dividends for his return. If he desires to dissociate himself from the company he can do so only by disposing of his stock.”

In,

Merchants Loan & Trust Co. v. Smietanka,  
255 U. S. 509; 41 S. C. 386;

the court reiterates the definition of taxable income and says (p. 389):

“In determining the definition of the word ‘income’ thus arrived at, this court has consistently refused to enter into the refinements of lexicographers or economists, and has approved in the definition quoted what it believed to be the commonly understood meaning of the term

which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution. *Doyle v. Michell Brothers Co.* 247 U. S. 179; 185, 38 Sup. St. 467; 62 L. Ed. 1054; *Eisner v. Macomber*, 252 U. S. 189, 206, 207; 40 Sup. Ct. 189; 64 L. Ed. 521, 9 A. L. R. 1570. Notwithstanding the full argument heard in this case and in the series of cases now under consideration, we continue entirely satisfied with that definition, and, since the fund here taxed was the amount realized from the sale of the stock in 1917, less the capital investment as determined by the trustee as of March 1, 1913, it is palpable that it was a 'gain or profit' 'produced by' or 'derived from' that investment, and that it 'proceeded' and was 'severed' or rendered severable from it by the sale for cash, and thereby became that 'realized gain' which has been repeatedly declared to be taxable income within the meaning of the constitutional amendment and the acts of Congress. *Doyle v. Michell Brothers Co.* and *Eisner v. Macomber*, *supra*."

The court also says (41 Sup. Ct. p. 388):

"There can be no doubt that the word must be given the same meaning and content in the income tax acts of 1916 and 1917 that it had in the Act of 1913."

And then quotes approvingly the definition from *Eisner v. Macomber*.

In,

*Goodrich v. Edwards*, 255 U. S. 527; 41 S. C. 391,

(construing the Income Tax Act of 1916) the court says:

“The act under which the assessment was made provides that the net income of a taxable person shall include gains, profits, and income derived from \* \* \* sales or dealings in property, whether real or personal \* \* \* or gains or profits and income derived from any source whatever. 39 Stat. 757; 40 Stat. 300, 307. Section 2 (c) of this same act provides that—

“For the purpose of ascertaining the gain derived from the sale or other disposition of property, real, personal, or mixed, acquired before March first, nineteen hundred and thirteen, the fair market price or value of such property as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such gain derived.”

And the definition of ‘income’ approved by this court is:

“ ‘The gain derived from capital, from labor, or from both combined,’ provided it be understood to include profits gained through sale or conversion of capital assets.’ *Eisner v. Macomber*, 252 U. S. 189, 207; 40 Sup. Ct. 189, 193 (64 L. Ed. 521, 9 A. L. R. 1570).”

The District Court in Montana had occasion to apply the law to facts quite similar to those at bar in,

U. S. v. McHatton, 266 Fed 602 (J. Bourquin) :

“Although taxes are not debts, and in respect to them the government is not a creditor, both being of higher nature, no reason is perceived why they are not within the principle that those who gratuitously take all a debtor’s property, to the extent thereof, may be held to respond for his present debts and obligations, inchoate or vested, or for the damages thereby inflicted—the sometime ‘trust fund’ doctrine, so far as corporations are concerned.

When defendants took the corporation’s property, there was right in plaintiff to thereafter impose further taxes. To pay any such taxes was then an obligation of the corporation. The right was in its nature inchoate; the obligation was contingent. Defendants took subject thereto. The contingency happened; the right vested. The act of September 8, 1916, to this extent takes effect by relation as of the first of the year, and prior to distribution and dissolution.

Accordingly, defendants are liable.”



We have shown that the book assets on June 1st were \$52,746.64 and consisted of the following items:

(a) Capital investment .....	\$30,000.00
(b) Net profits (estimated) .....	20,000.00
(c) Accruing current liability fund on old business.....	2,746.64
	<hr/>
	\$52,746.64

Now the evidence discloses that of this amount Peake actually received the following:

(a) The par value of his stock.....	\$15,000.00
(b) One-half the estimated net profits .....	10,000.00
	<hr/>
	\$25,000.00

And Boss received the other half.

The accruing current liability fund of \$2,746.64 has been heretofore explained.

Boss says that in the conversation at the depot Peake stated he must have the eight new automobiles. That conversation was May 21st or 22nd, 1917.

These eight automboiles were worth \$9,600, and this sum is strangely coincident and almost commensurate with Peake's one-half of the net profits, which was \$10,000.

In other words, Peake took the automobiles as his own until Boss could raise the money to settle with him, and the automobiles which he took, as per his conversation at the depot, were the physical assets of the corporation.

In the cash settlement of June 1, Peake received in money the following items:

(a) Par value of his one-half the capital stock.....	\$15,000.00
(b) Par value of his estimated profits	10,000.00
	<hr/>
	\$25,000.00

plus,

(c) His salary as officer and the value of his desk and chairs.....	1,137.15
	<hr/>
	\$26,137.15

Boss says that he took the rest of the assets, so here, then, is an agreement made on May 21st or 22nd, 1917, that the corporation would be dissolved and the assets divided; the assets were divided as per the understanding reached at that time, and, having been divided, Boss was clearly responsible to the government for his half of the tax, which he has paid, and Peake is just as clearly responsible for the unpaid half, which he refuses to pay.

Of course, as between Boss and the government,

Mr. Boss is liable, but as between Boss and Peake, we submit that under the definitions and the law just quoted, that Mr. Peake is responsible.

#### DEPLETION OF ASSETS

Viewed in another light, we say the evidence amply sustains the conclusion that the assets of the Boss & Peake Automobile Company were depleted on June 1st, 1917, because:

(a) Peake and Boss each took \$10,000 of the profits.

(b) The transaction involving the eight automobiles, whether viewed in the light of Boss' testimony or of Peake's testimony, shows that Peake knew the assets of the corporation were used to pay him the money, and

(c) In the \$26,137.15 deposit, Mr. Peake received the proceeds of a check issued by the corporation for \$8,537.15.

Boss says that after the dissolution and distribution the Boss & Peake Automobile Company ceased to do business. Peake admits he had nothing further to do with it and Boss and McReil both say that the C. L. Boss Automobile Company transacted all new business.

Certain it is that these matters must have been

talked over with Mr. Peake as early as May 31st, 1917, because the numerous documents in evidence were executed on that day. The cash payment was not made until June 1st, 1917, but the documents introduced bearing date May 31st, 1917, show that the agreement was made that day and that the final payment was not made until the next day.

Because, therefore, the Boss & Peake Automobile Company ceased to do business and practically dissolved, it follows that those who took the assets of that company are responsible for its debts.

In 14-A-C J 1120,  
the author says:

“Dissolution, however, may be shown if the cessation of business has that result or accompanied by other acts or circumstances indicating a surrender by the corporation of its franchise.”

In *Ferry v. Latrobe Steel Co.* 155 Fed. 161-171, where a corporation had proceeded to sell its property and abandon its corporate business and the directors attempted to subscribe with part of the liquidating funds, to stock in another corporation, the court held:

(p. 172) “In reply to a part of the defendant’s argument, I may add that I do not regard as

important the fact that a formal dissolution of the Steel Company has not yet taken place. Obviously, if the corporation had been actually dissolved, there could be no such question as is raised by the bill; for the power to carry on the corporate business would have ceased and the company's affairs would be in the course of administration by a judicial tribunal, or in some other manner. The controlling facts here are that the company undertook to liquidate and dissolve, that the process of liquidation and distribution has gone so far as to be nearly complete, that the corporate business has been wholly abandoned, *and therefore that the corporate organization—so it seems to me—exists in effect for the mere purpose of dividing the remaining assets among the stockholders, and not for the purpose of taking up again, and using, corporate powers that have been already relinquished.*”

Substantiating our claim of dissolution and distribution, attention is respectfully directed to the transcript at pp. 296 to 303. The pith of these pages of testimony is that Peake admits that he received the following sums in closing the transaction with Boss:



(a)	June 1, 1917, check for .....	\$26,137.15
(b)	The repayment at various times of the eight automobile notes of \$1200 each given to E. W. A. Peake by the partnership C. L. Boss Automobile Company at the closing of the transaction....	9,600.00
		<hr/>
		\$35,737.15

The items aggregating these sums constitute an account which can be rendered in the following form, and the following form only, to be consistent with the truth:

DEBIT		CREDIT	
a. Check .....	\$26,137.15	a. Money loaned (re- paid) .....	\$ 9,600.00
Made up as follows:			
1. Money loaned	\$9600.00	b. Capital stock .....	15,000.00
2. Check issued by Boss & Peake Automobile Co.	8537.15	c. $\frac{1}{2}$ profit .....	10,000.00
3. Borrowed from Western Bond & Mortgage .....	8000.00	d. Salary, desk and chair, less minor deductions .....	1,137.15
b. 8 notes of \$1200 each .....	9,600.00		<hr/>
	<hr/>		\$35,737.15
	\$35,737.15		

The account as stated above shows the circuitous methods which were adopted in closing the financial side of this transaction.

When it is remembered that Mr. Peake loaned Mr. Boss \$9600 on June 1st, 1917, which Boss deposited with the First National Bank as part of the deposit making the \$26,137.15 with which he paid

Peake, and that immediately after such deposit Mr. Peake presented Boss' check for the entire \$26,137.15 and had it credited to Peake's account in the same bank—First National Bank of Portland—it is seen that the loan of the \$9600 and its immediate repayment were simultaneous.

The \$26,137.15 item of deposit was made up of the following sums:

(a)	Boss borrowed from the Western Bond & Mortgage Co. ....	\$8,000.00
	and gave his note for it.	
(b)	Boss borrowed from Peake .....	9,600.00
(c)	Boss took the check of Boss & Peake Automobile Co. for.....	8,537.15
		<hr/>
		\$26,137.15

When this deposit was made Mr. Peake was right there at the bank and immediately presented Boss' check for \$26,137.15 and had that check credited to his own account.

Peake, therefore, was repaid the \$9600 which he loaned Boss at the identical window and at the same moment that the loan was made. The loan and its repayment were, therefore, surplusage in the transaction and the true transaction between Boss and Peake is shown in the following statement of Mr. Peake's account:

DEBIT		CREDIT	
a. His capital stock.....	\$15,000.00	a. Borrowed from Western Bond & Mortgage Company (Tr. p. 66)...	\$8,000.00
b. His one-half of the profits .....	10,000.00	b. Check from Boss & Peake Automobile Company .....	8,537.15
c. His salary, desk and chair, less incidentals	1,137.15	c. 8 automobiles which he took, accepted and he, himself, sold to C. L. Boss Automobile Company, taking title notes on each automobile in the sum of \$1200 .....	9,600.00
	<u>\$26,137.15</u>		<u>\$26,137.15</u>

At pp. 299-300 this phase of the transaction was brought directly to Mr. Peake's notice and he testified:

Q. Suppose, then Mr. Peake, that instead of loaning Mr. Boss the \$9600, you had simply taken a check for \$16,537.15?

Mr. Reilly: That is the twenty-six thousand less \$9600?

Mr. Smith: Yes, that is the twenty-six thousand less the \$9600.

Q. And the automobiles themselves, you would have had the exact amount, wouldn't you?

A. Yes; but I didn't do that."

The entire evidence, therefore, showing as it does that the assets of the corporation were depleted, as outlined above, it follows that those who benefited thereby are liable to the tax; and because Mr. Peake received his portion in the dissolution and distribu-

tion agreement and Mr. Boss received the remainder, it follows that Mr. Peake is liable for his one-half of the after-levied tax and should respond therefor.

We have thus set forth the transaction as it actually took place in the first statement above, showing that Peake actually received \$35,737.15, but because he had loaned \$9600 of this sum to Mr. Boss, his actual net cash from the transaction was \$26,137.15. Now the form of the transaction involved a loan of \$9600 from Peake to Boss and its immediate repayment, but looking to the substance and not the form, we submit that the second statement last above set forth conclusively shows that Peake did take the eight automobiles and in fact his testimony can hardly be construed any other way when we study its effect.

He says at p. 299:

“Q. Each of these eight notes of \$1200 was afterwards paid in full to you, wasn't it?

A. Yes.

Q. So that you got the \$9600 that they represented, didn't you?

A. Yes.

Q. Then you got the \$26,000 on the check, didn't you?

A. Yes.

Q. And the \$9600 on the notes?

A. Which I had paid.

Q. You loaned him—

A. Which I had money loaned, yes.

Court: What became of the automobiles?

A. I don't know. The notes were paid. What he did with the automobiles, I don't know.

Court: Were they turned back to him?

A. *They were turned back to him, yes.*

Q. *Anyway, you got your money out of them?*

A. *Yes. I suppose he sold them in the ordinary course of business.*

The inquiry becomes pertinent, namely: how could Peake turn the automobiles back to Boss unless Peake took the automobiles as Boss says?

In,

Eisner v. Macomber, 252 U. S. 189; 41 S. C. 189, at 195, Point 12 says:

“We have no doubt of the power or duty of a court to look through the form of the corporation and determine the question of the stockholder's right in order to ascertain whether he has received income taxable by Congress without apportionment.”



The pertinency of that language is palpable on the facts shown.

### TRUST FUND DOCTRINE

Viewed in another light the liability of Peake is disclosed under the trust fund doctrine because, as shown above, the agreement at the depot was for a dissolution of the corporaion and a distribution of its assets. This agreement was carried out on June 1st, 1917, and when it was carried out the corporation itself had no assets as such because its corporate powers were abandoned, its business had ceased, it existed in form only for the purpose of dissolution and its former stockholders had all of its assets.

Thereafter, and the following October, the Income Tax Law of October, 1917, was passed and its provision reached the past transactions of the corporation, but because the assets of the corporation had been divided and distributed among its stockholders and the corporation had been dissolved, the Government was compelled to look to those who had received such assets for payment of the corporate obligation, and, hence it has sued both Boss and Peake in this case.

The trust fund doctrine is adopted in and applicable to transactions such as these by the following Oregon cases.

Gantenbein v. Bowles, 206 Pac. 614; 103 Ore. 277 (289, et seq.);

Sabin v. Columbia Fuel Co., 25 Ore. 15;

Garretson Lumber Co. v. Hinkson, 69 Ore. 605.

Having in mind the Income Tax situation in June, 1917, and putting aside after-acquired knowledge, we respectfully submit that equity, looking at the substance and not the form of the transaction, should hold that the dealings between Mr. Boss and Mr. Peake in June, 1917, constituted a dissolution of the corporation and a distribution and division of its assets.

For the reasons stated we respectfully submit the decree should be reversed with directions to enter a decree in favor of the Government and against Peake, or, if the decree of the Government against Boss stands, then giving Boss a judgment against Peake for the amount which Boss must still pay on the unpaid balance to the Government.

Respectfully submitted,

JOHN F. LOGAN & ISHAM N. SMITH,

Attorneys for Appellant Boss.

Service of three copies admitted this — day of April, 1923.

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Attorneys for Appellee E. W. A. Peake.

Service of three copies admitted this — day of April, 1923.

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Attorney for Appellee U. S. of America.

In the  
**United States Circuit  
Court of Appeals**  
For the Ninth Circuit

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C. L. BOSS, Appellant,

vs.

THE UNITED STATES OF AMERICA, BOSS  
& PEAKE AUTOMOBILE COMPANY, a cor-  
poration, and E. W. A. PEAKE,  
Appellees

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**BRIEF OF RESPONDENT E. W. A. PEAKE**

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Upon Appeal from the United States District Court  
for the District of Oregon.

---

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Case No. 3996

In the  
**United States Circuit  
Court of Appeals**  
For the Ninth Circuit

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C. L. BOSS, Appellant,

vs.

THE UNITED STATES OF AMERICA, BOSS  
& PEAKE AUTOMOBILE COMPANY, a cor-  
poration, and E. W. A. PEAKE,  
Appellees

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BRIEF OF RESPONDENT E. W. A. PEAKE  
Upon Appeal from the United States District Court  
for the District of Oregon.

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STATEMENT.

This is a suit by the United States to recover the sum of \$6,202.65, with interest and penalties, claimed to be due as war excess profits tax from the Boss & Peake Automobile Company, an Oregon corporation, for the year 1917, and against the defendants C. L. Boss and E. W. A. Peake, who are made parties upon the theory that as owners of the corporate stock they have received as dividends and distributions the capital assets of the corporation all of its properties.

Boss admits that the corporation is indebted to the Government for the tax, and that he had sufficient corporate assets to pay the tax, but alleges that between himself and Peake the latter should pay the tax, inasmuch as Boss has already paid one-half.

Peake denies the validity of the tax, denies that demand was made upon him for it and claims that on the 1st day of June, 1917, he sold his stock in the corporation to Boss, and that if any tax is due it is due from the corporation and Boss and not from him. Judge Wolverton found against Boss and in favor of Peake, and decreed that Boss pay the tax. The Government being satisfied with the decree has not appealed, and Boss alone prosecutes the appeal.

Prior to November 8th, 1916, Boss, with one or more partners, was engaged in the sale of automobiles in the City of Portland, under the firm name of C. L. Boss & Company. This partnership had the sales agency for the Hudson and Maxwell cars. In the Fall of 1916 the Hudson Company brought out a new model, known as the Super Six, which immediately became popular and had a ready sale. The partnership was insolvent (transcript 153), but on November 8th, 1916, the defendant corporation was formed with a paid in capital of \$30,000.00 which was contributed by Boss and Peake in equal proportions, and each became the owner of one-half of the capital stock, although qualifying shares were transferred to R. E. Murphy and W. H. Bietau.

At the time of the formation of the corporation it was agreed that both Boss and Peake should draw salaries of the same amount—namely, \$175.00 a month (transcript 159).

The corporation obtained the agency contracts for the Hudson and Maxwell cars (transcript 125), and embarked upon a very successful career.

Some time in February or March, 1917, the relations between Boss and Peake became somewhat strained, and finally, on or about March 29th Boss presented to Peake a form of written contract (Peake's Exhibit A) whereby Peake should agree to sell his capital stock in the corporation to Boss on July 1st, 1917, at a price to be determined by an inventory of the assets of the company. Boss claims that this plan of sale was Peake's idea, but that when Boss's attorneys prepared the contract Mr. Peake refused to sign it (transcript 170, 171). Peake testifies that he was willing to sell his stock, but that he refused to do so upon an inventory basis (Transcript 274). About May 21st, 1917, Peake ascertained that Mr. McCornack, the representative of the Hudson Motor Car Company, had been in Portland for several days and that Boss had been constantly in his company at his hotel, and evidently being under some apprehension that this secret visit boded no good for him, made inquiry and found that McCornack was about to leave the city without ever having come to the corporation's place of business and without Peake ever having

seen or talked with him. (Transcript 275). He thereupon went to the depot and found Boss, McCornack and McRell in conversation there. The atmosphere was somewhat chilly, although McCornack was civil to Peake, but evidently had been prejudiced against him by Boss, and when Peake tried to explain his side of the controversy McCornack said that he understood that he, Peake, had been trying to give Boss the worst of it, although in what particulars the record is absolutely silent. Peake saw that McCornack was utterly opposed to him and so he dropped out of the conversation. (Transcript, page 275.)

Either immediately before or immediately after McCornack took the train Peake took Boss aside and broached the proposition that Boss had therefore made to buy out Peake on July 1st, and asked him if he would be able to get his money together by June 1st. Boss said he would, and Peake then said: "I will make you a price. I will make you a price of \$25,000.00 for the stock and I will expect the salary credit to be paid." To this Boss agreed. (Transcript 276.) It was thereafter ascertained that the salary credit was \$1,079.17, and Boss agreed to buy Peake's desk and chair at a price of \$57.98, making a total of \$26,137.15.

On May 31st Peake prepared his resignation as officer and director of the corporation and on the morning of June 1st delivered 150 shares of stock, endorsed in blank, to Boss, together with the resignation, and re-



ceived from Boss the latter's *personal* check for \$26,137.15.

It now appears that Boss obtained this money in the manner following:

Personal loan upon his individual real estate	
from the Western Bond & Mortgage Co..	\$ 8,000.00
Check from the corporation's account.....	8,537.15
Loan from Peake secured by warehouse receipts and title notes on eight Hudson automobiles .....	9,600.00
	<hr/>
	\$26,137.15

Thereafter Peake had no further connection with Boss or the corporation (Transcript 223), never participated in its affairs, and Boss and McRell proceeded to run the business, having complete and unquestioned control and possession of all of the assets of said corporation, and for some time there was no difference made in the books of the corporation or in the way it conducted its business. From June 1st to June 19th, numerous checks were signed by the corporation as is disclosed by the stubs in the check book, Peake's "Exhibit J." These checks were signed by the officers of the corporation (Transcript 261), who at that time were Boss and McRell.

The \$8,537.15 which was drawn from the corporation bank account by Boss was charged to him on the

books of the corporation, and not to Peake (Transcript 205).

About the middle of June, 1917, Boss and McRell determined to conduct the business as a co-partnership, and thereupon called a meeting of the stockholders, and by appropriate resolution the corporation was dissolved and its assets of every kind and nature were transferred to the co-partnership of Boss and McRell, doing business under the firm name and style of the C. L. Boss Automobile Company, and a bill of sale executed and acknowledged in July, 1917.

Counsel for appellant in their brief (page 33) attempt to make considerable capital out of the fact that Judge Wolverton, in his opinion, 285 Fed. 420, transcript, page 55, uses the language:

“Another circumstances is that Boss borrowed \$8,537.15 from the corporation *on his note* and with this paid Peake in part the consideration for which he sold his stock.”

They say that Boss did not give his *note* to the corporation. It is true that the record does not disclose that Boss gave a note, and this was evidently an oversight on the part of the trial judge. It is, however, a mere quibble on the part of the appellant for the meat and effect of the transaction was precisely as the opinion states. The record affirmatively discloses and the appellant himself makes no denial of the fact that Boss borrowed \$8,537.15 from the corporation funds by

writing a check to himself for that amount, that this amount is charged against him personally on the corporation books (Transcript 205), and that he put this money in his own bank account and used it with other moneys for the purpose of paying Peake. He thereby became indebted to the corporation for that amount, and it is utterly immaterial whether that debt was or was not evidenced by a note.

Boss never claimed that his transaction with Peake was a distribution of the capital assets among the stockholders, looking toward the dissolution of the corporation, until after the middle of 1920, when the Internal Revenue Income Tax division checked up the books of the corporation and ascertained that it was subject to a heavy tax. When he found that a tax of over \$12,000.00 was assessed against the corporation, and in reality assessed against himself and McRell because they had taken over all the assets and properties of the corporation of every kind, he and his partner then proceeded to devise an ingenious scheme to avoid the payment of one-half of the tax by placing it on the shoulders of the man who had sold his stock to Boss over three years before. The methods that Boss and McRell pursued are not such as to commend them to the court. Peake was never informed that the Government was auditing the books or making any claim for taxes. He was never given an opportunity to check this audit or be present when it was being done. He was never informed that Boss was making an ex parte showing to

the Government to the effect that Peake was liable for any portion of the tax, and it was not until after the tax had been assessed and the local officers of the Revenue Bureau had been misled by the affidavits of Boss and McReil that Peake had any inkling of any claim against him. Even then the Revenue Bureau declined to permit him to see the return or the papers in the case unless he first acknowledged that he had assets belonging to the corporation in his possession.

A very significant fact exists in the circumstance that the theory that Boss and McReil pursued in their affidavits to the Government in 1920, is diametrically opposed to the testimony which they gave upon the witness stand in the case. The truth is always consistent with itself, and it is never necessary to make a change of front when frankly stating the facts. It is an earmark of concocted stories that they bear upon their face inconsistencies and contradictions. The trial court looked upon this change of front on the part of Boss and McReil as throwing most serious question upon their credibility, and we quote from the opinion:

“Referring to the affidavits of Boss and McReil, made at the time the tax was assessed, it will become apparent that Boss then had a somewhat different theory of the supposed division of the assets between himself and Peake; the theory being that there was an equal division of the entire assets of the corporation. McReil concretely states what was then done, from Boss’ standpoint, as follows:



'That on said 1st day of June, 1917, a division of the physical assets of said Boss & Peake Automobile Company, a corporation, was had and made by ascertaining from the periodical statement, kept and maintained by said corporation, of the value of all the physical assets, including accounts and estimated profits, and by such division, E. W. A. Peake received in cash the full sum of \$26,137.15, which was one-half of the value of said assets, as above set out, together with the value of a certain desk owned privately by E. W. A. Peake, and valued at \$53.50, in other words, E. W. A. Peake received one-half of \$52,167.30, which was \$26,083.65, plus \$53.50, making \$26,137.15.'

"Boss says, speaking of the alleged agreement of May 21st, that the assets 'were to be divided, 50 per cent going to myself and 50 per cent going to Mr. Peake.' His testimony now shows that the total assets of the corporation were, on June 1st, \$52,746.64, of which \$22,746.64 was carried in profit and loss account; that \$10,000.00 of this amount was paid to Peake, \$11,373.32 credited to himself, and \$1373.32 passed to surplus account and subsequently divided between himself and McRell, according to their several interests in the co-partnership; so that there could not have been a physical division of assets, as asserted by Boss and McRell in their affidavits addressed to the revenue officers. Nor was there an equal division of such assets.



There was never an inventory made up of the entire assets, brought down to the date of the culmination of the transaction, and the parties did not deal with reference thereto when they closed their negotiations. This change of position by Boss and McReil is of significance in weighing the testimony pro and con touching the controversy, and in determining what was the real agreement of the parties."

The affidavits of Boss and McReil are obviously untrue, and yet they were made at a time when their recollection of the facts must have been at least as fresh and clear as they were some two years later in the Summer of 1922 when they gave their testimony in the case. We say "obviously untrue" because the statements therein given as to the net worth of the corporation contradict the actual net worth as ascertained by the books which show a net worth of \$52,746.64—obviously untrue because the bookkeeper states that no statement was ever taken from the books of the corporation between the 1st of January, 1917, and the date when Peake sold out, and the books for May were not closed until a considerable time after the transaction in question had been fully consummated. (Transcript 330, 343.)

The Government auditor, Weldy (Transcript 235), testifies that the only statement taken from the books which he saw were what he would term "trial balances,"

and on page 239 of the testimony he testifies that there had been no inventory taken of the assets of the Boss & Peake Automobile Company as of June 1st, 1917, and therefore it was impossible to prepare a profit and loss account. These facts are exceedingly important for the reason that a trial balance does not disclose the net assets of a corporation, nor does a profit and loss account disclose the net worth of a corporation, unless an inventory has been taken. (Transcript No. 7.)

Again the affidavits of Boss and McRell are shown to be untrue in that the net worth as established by the Government report does not take into account the salary of Peake and Boss for the reason that they had already charged that off as part of the expense, even though it had not in fact been paid.

The trial court calls attention to the fact that there was no equal division made of the assets of the corporation for the reason that there was credited to Boss from the profit and loss account \$1,373.32, and later an additional sum of \$1,373.32 was credited to Boss in the sum of \$996.21, and to Mr. McRell in the sum of \$397.11, showing a total of \$2,746.64 over and above the amount that Boss claims was distributed to Peake as a capital return and dividend. It became necessary, therefore, that the appellant and his partner McRell furnish some explanation of this matter, so we have the unique statement that they agreed that this sum should be retained by Boss to meet the current liabilities of the

corporation. But this change of front is of no avail to the appellant because it likewise is obviously untrue and its falsity is established by the audit of the Government. The corporation was engaged in the sale of merchandise and it made an income tax return upon an accrual basis and not upon a cash basis, and in fact was required so to do by law. Therefore in ascertaining its net earnings as of June 1st, 1917, all obligations of the company during the taxable year, whether paid or unpaid, were deductible from the earnings as an expense. Yet the Government audit shows that after making all deductions, including salaries to Boss and Peake, the net income of the corporation for the year 1917 was \$22,549.94 (Transcript 95), and in addition thereto there was an ascertained net income for the six weeks in 1916 of \$604.21 (Transcript 100).

Therefore the net worth of the corporation as of June 3, 1917, was as follows:

Capital .....	\$30,000.00
Net income for 1917.....	22,549.94
Net income for 1916.....	604.21
<hr/>	
Total.....	\$53,154.15

In other words, after being allowed by the Government for all expenses of running the business and after deducting the unpaid salaries there was still a balance of assets in excess of the capital investment of \$23,154.15.

But the bookkeeper Murphy says that these credits to Boss and McRell were made by him without instructions from Boss and largely to satisfy his own curiosity as to how the transaction between Boss and Peake actually ended up (Transcript 361).

In arriving at the truth as to this transaction and in order to weigh the evidence of Peake, Boss and McRell, we find a very curious and enlightening piece of testimony from Mr. Boss. It should be noted that in Boss' further and separate answer and defense by way of a cross bill, paragraph V (Transcript 15), it is alleged that an agreement was made on the 23rd day of May, 1917, that the properties of the corporation should be divided by Peake taking over one-half of the properties in kind or money's worth, and that on the 31st day of May, 1917, the properties and assets of the corporation were by agreement between Boss and the defendant Peake divided and it was then agreed that the corporation should be at once dissolved.

In paragraph VI (Transcript 16), it is alleged that on the 1st day of June, 1917, the defendant Peake received his 50% of the properties and assets of the defendant corporation in property, security and moneys amounting to \$26,083.65, being one-half of the value of the physical properties and assets of the defendant corporation.

It is evident that Boss became aware of the fact that the Government could not recover against Peake unless



it should be established that the physical assets of the corporation actually came into his possession and that if instead of Peake obtaining the physical assets it was Boss himself who received them, then Peake would not be liable. Boss, of course, knew that what Peake actually received for his stock in the corporation was Boss' personal check for \$26,137.15. So we find Boss putting these words into Peake's mouth in describing the transaction at the depot: "I will take title notes on all of the new Hudson cars so that a distribution and dissolution can be completed. I will take the physical assets. I will take the automobiles of the corporation and sell them to you boys and take title notes and loan you boys the money on the various automobiles so that the dissolution and distribution can be completed."

"Q. At that time what other things were said, if any, as to how you would arrive at what sums should be paid?

A. Mr. Peake said: 'In doing so I must have my salary, I must have my capital and I must have my net profits which I estimate—net profits I estimate to be \$20,000.00 after allowing over \$2,000.00 for profit and loss on the notes that were endorsed, the service on the cars that were out and the incidental bills that were not in.' " (Transcript 188.)

Now it must be remembered that at that time no inventory had ever been taken of the physical assets,



the books had not been balanced, the profit and loss account had not been ascertained and was not ascertained until some time after Peake had sold his stock. It is a peculiar circumstance that Peake should have mentioned a figure that closely approximated the actual excess of profits over the sum of \$20,000.00. It is further curious that he should have used the language: "I will take the physical assets. I will take the automobiles of the corporation and sell them to you boys," etc., when it is apparent from the actions of the parties that none of them ever had such a thing in mind. What actually happened, was Boss on June 1st found himself disappointed in his negotiations for money and was short \$9,600.00, and that Peake loaned him that sum and took as security title notes of the C. L. Boss Automobile Company, together with warehouse receipts upon eight Hudson automobiles (Transcript 147). These notes were entered as bills payable in the books (Transcript 149, 150, 228), and McRell testifies (Transcript 246) that Peake said he would take the note of the C. L. Boss Automobile Company—that is, he would loan money to the C. L. Boss Automobile Company and take new automobiles that were controlled by the Boss & Peake Automobile Company as security for the loan, "these eight automobiles to apply on this loan." This latter statement confirms Peake (Transcript 282, 298, 299, 300, 310) that he took the warehouse receipts and notes as security for the re-payment of the \$9,600.00, and in

this Peake is further corroborated by Murphy, the book-keeper (Transcript 332).

In fact, Mr. Isham Smith, one of appellant's counsel, declined to answer the court's question as to whether or not Peake took these automobiles as security or as a purchase (Transcript 285). As the loan of \$9,600.00 was paid the notes were cancelled and the warehouse receipts were surrendered to Boss and McRell. Referring again to the \$2,746.64 which was credited to the accounts of Boss and McRell and which represented the profits which they made in the purchase of Peake's stock, if it was found that the sum was not sufficient to cover the current obligations, the service of the cars, etc., the proper and natural course would have been to credit that sum to the partnership itself as a part of its assets to meet these obligations. Instead, however, the partners took the credit to their own personal accounts, showing that they considered it as being something to which they were personally entitled. There is no claim that the partners individually paid these alleged current obligations, and if they did not make these payments individually there is no reason why the surplus in the profit and loss account of the corporation should be placed to their credit unless the entry was made to show the true facts, namely, that in paying \$25,000.00 for Peake's stock, Boss had realized a profit of \$2,746.64, to a portion of which McRell became entitled as he contributed his share of the capital of the new enterprise.

Counsel took a page in their brief (page 13) to say that the trial court's statement of entries in the combined journal and cash book are out of balance because items for salary and desk and chair are not in the proper column. Not having the books before us we cannot say whether the learned trial judge's stenographer copied the entries from the books accurately so as to place them in the proper column, but the statement as made is so perfectly clear that it makes no possible difference in this case whether the two items should have been in one column or the other and we are at a loss to know why counsel should take the time to discuss it.

The clearing account (appellant's brief 16) became important in this case for two reason: First, it showed that not until June 19, 1917, long after Peake had sold his stock, was it that the C. L. Boss Automobile Company had a bank account, and then only because it had been agreed that this co-partnership should take over all of the assets of the corporation of every kind. The court will note that the call for the stockholders' meeting was sent out on June 14th, 1917, that Boss owned all of the stock of the corporation, and just before he had the corporation formally dissolved the bookkeeper was instructed to make the entries, clearing the moneys of the corporation into the bank account of the C. L. Boss Automobile Company, a partnership.

Another factor which goes to show the transaction between Boss and Peake was not a dissolution and distribution of assets is the fact that the corporation had

a value in addition to its physical assets; it was a going concern and it had a valuable agency contract with the Hudson and Maxwell manufacturers (Transcript 124, 125, 157). According to Peake the good will of the business was worth at least \$50,000.00, and Boss, although admitting that the contract was of value, dodged and twisted and refused to put a value on it until finally the court, after repeated questions, gave up all attempt to get him to make a direct answer (Transcript 166). Peake admits that he did not get very much for this good-will, and this is readily explained when we remember that when the factory representative of the Hudson Motor Car Company was in Portland in May that Boss studiously kept him away from the company's place of business, filled his ears with his side of the controversy with Peake, never gave Peake an opportunity to state his contention, and so undermined him with the Hudson Motor Car Company that it became apparent that he must sell his interest in the corporation.

## BOSS ASSUMED ALL OF THE LIABILITIES OF THE CORPORATION

According to the testimony of the appellant himself, it was agreed that Peake was to be absolved from the burden of any liabilities of the corporation. We quote from the testimony of the appellant himself (Transcript 144):



"Q. Now, you stated what Mr. Peake took in this dissolution and distribution. What became of the balance of the assets of the Boss & Peake Automobile Company? Who got that?

A. The division would go to me; and I would have the liabilities and the assets of what was left after he had his capital, his net profits, and his salary. I would have mine in the stock and the accounts **AND THE LIABILITIES."**

And, again, on page 175 of the transcript the appellant testifies:

"Q. Was there any agreement at that time, when the stock was transferred to you, that Mr. Peake was to assume or respond to any of the corporation's liabilities?

"A. No, he was not to assume—respond to anything.

"Q. And the agreement was, was it not, that in that transfer you were to take whatever liabilities there were?

"A. Yes, that is right. **I WAS TO TAKE THE LIABILITIES."**

An examination of this case from any angle discloses that there never was any attempt to make an equal division of the assets, and that the transaction was purely and simply a sale of stock.



The appellant lays stress upon the fact that on or about June 1st, 1917, he and McRell in compliance with the Oregon laws filed a certificate of doing business under the assumed name of C. L. Boss Automobile Company, and says that this is conclusive that there was an understanding that the corporation had been in fact, if not in law, dissolved, and its assets distributed.

It appears, however, (Transcript 329), that, after Peake had sold his stock, Boss attempted to persuade Murphy to buy some of the stock, that when McRell put up his \$5,000.00 it was undecided whether the business would continue as a corporation or under the form of a co-partnership. (Transcript 336). It is of course clear that after Boss bought Peake's stock he did not want the latter's name to further appear in the business and while the situation remained in a state of flux and it was undertermined whether to change the name of the corporation to the C. L. Boss Automobile Company or to form a partnership, a certificate of assumed name must necessarily be filed in order to comply with the Oregon law. (Oregon Laws, Section 7777 et seq.).

It is an odd circumstance that if Peake was interested in having the corporation dissolved that no written contract was entered into and that he signed and endorsed his stock to Boss without in any way protecting himself against the latter if Boss should refuse to complete the dissolution. Is it not true, that after Peake received his money and endorsed his stock to

Boss, the latter would have had a perfect legal and moral right to continue the business as a corporation without interference from Peake? And this even without changing the corporate name. Plainly the determination to continue or dissolve was entirely within the hands of Boss, and over his actions Peake had and could have no control. In fact Boss admits that Peake had nothing to do with the business of the new company after he sold out. (Transcript 223).

Although Murphy was a director of the corporation and in charge of the corporation books, Boss never mentioned to him that he and Peake had agreed upon a dissolution of the corporation, but said that he had bought Peake's stock for \$25,000.00, (Transcript 333), and his conversation with Murphy detailed at page 331 of the transcript shows that for months he had been trying to harass Peake until the latter would agree to sell his stock.

The determination of this case depends upon the credibility to be given to the several witnesses. The trial court had the opportunity of seeing them, of observing their demeanor, their apparent hesitation or lack of frankness, and truthfulness. The appellate court is deprived of these aids in determining the facts, and for that reason great weight must necessarily be given to the trial judge's opinion upon these matters. Judge Wolverton decided that Peake and Murphy told the truth, and that Boss and McRell did not. Counsel are

entirely mistaken in assuming that the court found the preponderance of the evidence with regard to the conversation at the depot was in favor of the appellant. On page 38 of their brief they quote from the learned judge's opinion, but unfortunately they omit the portion of the opinion immediately following which puts an entirely different complexion upon the language quoted.

It is true that the court says:

"Standing alone *and according to the witnesses' full credibility*, Boss would have the preponderance of the evidence in his favor",

but the court continues and says:

"But the conversation at the depot is not all there is in the record to explain the transaction. The agreement culminated at the bank. We have in what took place there physical facts, which in their evidentiary character are potent, and scarcely to be disputed. In short, Boss assembled his funds and placed them in the bank to his credit, so that he could draw against them. Thereupon he drew his check to the order of Peake, and delivered it to him. At the same time, Peake's stock was assigned in accordance with their understanding, and thus the transaction was closed. Concretely, this was a culmination of the entire agreement. Nothing whatsoever was reserved respecting a dissolution of the corporation. Boss had acquired the stock, and, he being the owner of the other half of the

stock, the corporation was in his hands, to do as he liked with it—to dissolve it, and wind out the business in which it had been engaged, or to continue it as a going concern.”

In fact, the opinion of the trial judge contains so fair an analysis, and is so conclusive in its determination that we feel it to be a work of supererogation to attempt to amplify it.

## POINTS AND AUTHORITIES

### I.

Allegations that corporations “are dissolved” are conclusions of law.

Klamath Lumber Co. vs. Bamber, 74 Or. 292.

Dowd vs. American Surety Co., 69 Or. 418.

### II.

The only method of dissolution of a corporation is that provided by the Code.

North vs. United Savings & Loan Assn., 59 Or. 483, 495.

## III.

While a corporation is a going concern it may dispose of its assets and no trust follows them.

Macbeth vs. Banfield, 45 Or. 553.

McDonald vs. Williams, 174 U. S. 397, 401.

## IV.

Upon the dissolution of a corporation its stockholders become the owners of its assets, subject to a trust in favor of the creditors.

Service vs. Sumpter Valley R. R., 81 Or. 32, 48.

Smyth vs. Kenwood, 97 Or. 19.

## V.

Transfer of the entire property of a corporation does not operate as a dissolution.

5 Thompson on Corporations, Sec. 6493, page 1291.

5 Thompson on Corporations, Sec. 6498, page 1296.

## VI.

Shares of stock may be sold after dissolution which has the effect of transferring the interest of the stockholders in the corporate assets.



5 Thompson on Corporations, Sec. 6568, page 1367.

## VII.

A transferee of shares of stock is liable to the transferor for any sum the latter is required to pay on subsequent calls on the stock.

14 Corpus Juris 705.

## VIII.

A court cannot relieve a purchaser from the legal effect of his purchase of stock in a corporation simply because he did not anticipate certain debts.

Mitchell vs. Holman, 30 Or. 280, 285.

## IX.

A demand is necessary before the Government can proceed to enforce collection of a tax.

3 Fed. Stat. Ann. 2nd Ed., page 1012, Sec. 3184.

Revised Statutes, Sec. 3184.

Compiled Statutes of 1916, Sec. 5906.

## X.

Equity will not follow a trust fund beyond an account in which it is minged with other funds unless its identity can be traced clearly, and equity will assume

that a person checking out of such combined fund is doing so out of the funds not subject to the trust.

Schwartz vs. Gerhardt, 44 Or. 425, 432.

Hewitt vs. Hayes, 91 Northeastern Mass., 332,  
334.

We have discovered no case in which a transaction of this kind was sought to be classified as a dissolution agreement, or in which a purchaser of stock sought to be reimbursed for obligations of the corporation which he had overlooked in purchasing the stock or of the existence of which he was not aware. There is, however, a decision of the Supreme Court of Oregon by Mr. Justice Bean, now of the Federal bench, which in our judgment settles the law of this case. We refer to

*Mitchell vs. Holman*, 30 Oregon 280; 47 Pac.  
616.

Holman, a stockholder and officer in a corporation, sold his stock. At the time there was due the corporation a sum of money previously earned by the corporation under a contract with the state. Asserting his right to this money, Holman applied to and received the amount from the state, and an action was brought to force Holman to give the purchasers of his stock credit for the amount received by Holman. Holman alleged that in the sale of his and the other stockholders' shares of stock, it was contemplated that he and the other old

stockholders should collect the money at that time due the corporation from the state. This did not appear in any of the papers, but Holman alleged that it was omitted by mutual mistake. However, the Supreme Court held that to establish a mutual mistake there must be clear and satisfactory evidence and that Holman had wholly failed to prove it. The trial court found that the fund in question was not in the minds of the parties when the contract was made, and hence ought to be excluded from the operation of the contract. The Supreme Court, however, found that even if this were true it constituted no ground for relief. The following is quoted from the opinion at page 286:

“If the parties did not make the contract they intended, or if the legal operation of the one made is different from what they expected, it might, perhaps, have been a sufficient ground for a refusal on the part of Holman to perform, but it affords no defense to this suit. The contract as made has been fully executed, and a court cannot now relieve either party from the legal consequences thereof; 15 Am. & Eng. Enc. Law (1st Ed.), 631. So that, on this record we do not see any grounds upon which the defendant can be relieved from the consequences of his contract, although it seems probable he did not suppose that the legal effect of the sale and transfer of his stock in the corporation would deprive him of the right to collect the money due from the State at that time. Such,

however, is the effect, and the court cannot relieve against a mere mistake of that kind. *Archer vs. California Lumber Co.*, 24 Or. 341 (33 Pac. 526)."

In support of the present transaction being what it appears on its face, we have positive testimony of Mr. Peake and Mr. Murphy, at that time a stockholder and officer of the corporation, and not now associated with any of the parties. The testimony of both of them is that this was purely and simply a sale of stock, and that Mr. Peake had no other thought in mind, and that it was immaterial to him, when once his stock was sold, what was done with the corporation, whether it was continued in the old form, changed its name, or dissolved. In addition, Mr. Murphy testifies that about the time of the sale Mr. Boss suggested to him that he attempt to borrow money from Peake for the purpose of purchasing stock in the corporation.

This testimony seems intrinsically reasonable and probable. Why should Mr. Peake care whether the corporation was dissolved after he sold his stock? It is difficult to conceive a reason. If, however, for some mysterious reason he was insistent upon dissolution, is it probable that he would have parted absolutely with his stock, thus making it impossible for him to force compliance with his demand.

It should be borne in mind, of course, that even if the evidence disclosed dissolution of the corporation immediately after the transfer of the stock, it would not

necessarily follow that Peake had demanded its dissolution. It would be entirely conceivable that the corporation should have been dissolved immediately and yet Peake have had no knowledge that its dissolution was to take place. Even if he knew, that would not constitute a participation in the dissolution. Attention is called to this fact because counsel for Boss seemed to assume that if they have proved that dissolution occurred shortly after Peake sold his stock and that Peake knew it was to occur, he is therefore a party to a dissolution agreement.

However, the evidence not only does not disclose that dissolution did occur immediately afterward, but affirmatively discloses that it did not. We have not only the testimony of Mr. Peake, and Mr. Murphy, but every act of the corporation's officers indicates otherwise.

The books of the corporation were carried on without any change in form, without the ruling of a line. The corporation continued to have a bank account in which all of the receipts of the business were deposited, and from which all of the expenditures of the business were made. The partnership, which it is alleged went into business on June 1st, had no bank account until June 19th, when its bank account was started by a check from the corporation. (Tr. page 168). During the interval between June 1st and June 19th numerous checks were issued by the corporation, as is disclosed by the stubs in the check book, Peake's Exhibit "J". These checks



were signed by the officers of the corporation; (Tr. pages 168, 168). These officers were Boss and McRell.

The trust fund doctrine under which the appellant bases his claim that Peake is liable under no circumstances is applicable to the case at bar. At the time of the transaction the corporation was a going concern, and continued as such and until June 19, 1917, it was not insolvent, but on the contrary was in a highly prosperous condition and had accumulated and had on hand net profits equal to nearly 75% of its invested capital. The so-called trust fund doctrine is never applicable until a corporation has either suspended its business or has become insolvent, and its assets have been placed in the hands of a court of equity for administration and are in the course of final settlement and distribution, and even then it is the capital stock of the corporation which constitutes the trust fund and not its profits.

Thompson on Corporation, 2nd Ed. 3421.

Garetson Lumber Co. vs. Hinson, 69 Or. 605, 609.

In the latter case the Supreme Court uses the following language:

“The rule has been settled by our adjudications that mere insolvency does not of itself convert corporate property into a trust fund; but when a cor-

poration ceases to transact business and is insolvent, its assets then constitute a trust fund for the payment of the corporate debts without the intervention of a court of equity to administer upon the property for the purpose of a final settlement.”

As we have pointed out, this corporation continued to engage in business under the sole control of Boss until June 19, 1917, and then its entire assets and property of every kind were taken over by the co-partnership of Boss and McRell, doing business as the C. L. Boss Automobile Company. It does not appear that this partnership paid any consideration whatsoever for those assets, and the only theory under which the transfer can be sustained is that Boss as the owner of all of the capital stock of the corporation dissolved the same and used those assets as his own.

In the case of *Martin vs. City of Lexington*, 183 Ky. 714, 210, *Southwestern* 483, the owners of the stock in a corporation sold and delivered their stock to Martin, which transaction he attempted to construe as a purchase of the assets. After the sale he took charge of the business, mingling his merchandise with that taken over. He was held liable for taxes assessed against the corporation's stock of merchandise in a suit to recover against him as a stockholder. Martin claimed to have purchased the assets and not the stock, but the court in an able opinion holds otherwise. In this case the defendant Peake never received any of the assets

of the corporation. Boss paid for Peake's stock from his own funds. In order to gather the funds he borrowed \$8,537.15 from the corporation. He pledged to Peake eight automobiles as security for \$9,600.00, which Peake loaned to him. The loan was afterwards paid, and the liens upon the automobiles released, so that there is no possible claim that any assets of the corporation came into Peake's hands, and therefore under no theory of the case can Peake be held liable for the tax.

The decree of the lower court should be affirmed.

Respectfully submitted,

JOHN F. REILLY

and

WINTER & MAGUIRE,

Attorneys for Respondent Peake.

Service of three copies admitted this ..... day of  
May, 1923.

.....  
Attorneys for Appellant C. L. Boss.

Service of three copies admitted this ..... day of  
May, 1923.

.....  
Attorney for Appellee U. S. of America.

IN THE  
**United States Circuit Court  
of Appeals**  
FOR THE NINTH CIRCUIT.

---

C. L. BOSS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,  
BOSS & PEAKE AUTOMOBILE COM-  
PANY, a Corporation, and E. W. A.  
PEAKE,

Appellees.

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**Brief of Appellee, The United States of America**

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Upon Appeal from the United States District Court  
for the District of Oregon

JOHN S. COKE,

United States Attorney for the District of Oregon,

THOS. H. MAGUIRE,

Assistant United States Attorney for the District  
of Oregon,

Attorneys for Appellee,

The United States of America.

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THOS. H. MAGUIRE,

Assistant United States Attorney for the District  
of Oregon,

Attorneys for Appellee,

The United States of America.

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## STATEMENT OF THE CASE.

The pertinent facts in this case are stated very clearly in the trial court's opinion (Trans. P. 36), and we desire to add very little thereto.

The Boss & Peake Automobile Company was organized and incorporated under the laws of the State of Oregon on November 8, 1916, with a capital stock of \$30,000.00 divided into three hundred shares of \$100.00 each. Of these shares Boss subscribed 149, Peake 149 and W. H. Bietau 2 shares. Subsequently Miss Bietau assigned one of her shares to R. E. Murphy.

Miss Bietau and Murphy were mere holding stockholders for Boss and Peake respectively and in reality Boss and Peake were equal owners of the capital stock, each owning 150 shares, and each having paid into the concern as capital investment the full par value thereof.

The corporation at once entered upon the business for which it was organized and the status of the stockholders remained the same until June 1, 1917, when Peake transferred his stock to Boss, and the holding shares were so transferred that the entire capital stock was under the control of Boss and his representatives.

There had been a lack of harmony between the two main stockholders and during the month of March, 1917, Peake offered to sell his stock to Boss and a memorandum agreement was drawn up (Peake's Exhibit "A," Trans. P. 172 et seq.), reciting that Boss and Peake had agreed that Peake should sell his stock in the corporation to Boss and providing for the means of arriving at the value of same. However, after the agreement was drawn up Peake refused to sign the agreement and nothing further was done in the matter until about the 21st of May, 1917. At that time, following a conversation held at the Union Station in Portland, Peake agreed to sell his stock in the corporation to Boss for a consideration of \$25,000.00 plus salary allowance and allowance for office furniture owned by Peake in the amount of \$1137.15. This was agreed to at the time by both parties and the final transfer of stock took place on June 1, 1917, upon payment by Boss of the sum of \$26,137.15, which was given to Peake in the form of Boss' personal check for that amount.

The books of the corporation show beyond any doubt that the total assets of the corporation were \$52,746.64 and that the profits of the company on June 1, 1917, were \$22,746.64. Peake claimed that the



price set by him upon this stock was a flat rate and was not in intent or effect a division of the assets.

Boss secured the money to pay Peake by the following means: he gave to Peake eight notes attached to warehouse receipts, each in the amount of \$1200.00, offering as security eight Hudson automobiles, for which Peake gave Boss a check for \$9600.00, which was deposited by Boss in his personal account. Boss further negotiated a personal loan from outside sources in the amount of \$8000.00, and borrowed from the corporate funds \$8537.15, which amount was charged against him personally upon the books of the corporation.

Peake, on May 31, tendered to the Board of Directors and stockholders of the corporation his resignation as Secretary, Treasurer and Director of such company. On the same day at a stockholders meeting at which were present C. L. Boss, representing 298 shares, R. J. McRell 1 share, and R. E. Murphy 1 share, his resignation was accepted and McRell was elected director in his stead.

On June 22, 1917, a meeting of the directors and stockholders of the corporation was held, at which time the corporation was formally dissolved.

The bank account of the corporation had been con-

tinued and business had been done as usual until June 19, 1917. Between that date and the 22nd of June, a bill of sale was executed by the corporation transferring all its assets to the C. L. Boss Automobile Company, which was a co-partnership composed of C. L. Boss and R. J. McRell.

The books of the corporation show that on June 1, 1917, \$22,746.64 was carried in the profit and loss account and that against that account \$10,000.00 was charged as being the premium on Peake's stock, \$11,-373.32 was credited to Boss and \$1373.32 passed to surplus account and subsequently divided between Boss and McRell, according to their several interests in the co-partnership subsequently formed. There was never an inventory made up of the entire assets of the corporation brought down to the date of the transaction.

Boss claims that this surplus of \$2,746.64 was agreed upon by himself and Mr. Peake as a sufficient amount to cover the current obligations of the corporation and it was not in fact a profit to be divided between himself and Mr. McRell.

Then follows the assessment of the tax against the corporation, which occurred in 1920, and Boss' payment of one-half the amount and his claim that the balance was due from Peake.

It is admitted by appellant that that portion of the tax which was assessed for the year 1916 is rightfully assessed against the corporation. There is also no dispute as to the validity of the assessment of the taxes for the year 1917.

### POINTS AND AUTHORITIES.

This appellee takes the position that the findings of the trial court as to the validity and amount of the tax due and the decree that the appellant is liable for the tax should be sustained. We are not concerned with any private agreements or transactions between the appellant and the appellee, Peake. Therefore, this appellee will confine its argument to the following points:

#### I.

The income and excess profits tax provisions of the Act of October 3, 1917, are retroactive to January 1, 1917, by the express terms of the act. Act of October 3, 1917, (40 Stat. 30), Title 1, Sections 1 and 4; Title 2, Section 200; Title 13, Section 1302; Section 10, Title 2, Act of September 8, 1916.

#### II.

The act is not unconstitutional by reason of retroactive operation.

Flint vs. Stone Tracy Co., 220 U. S. 107.

Brushaber vs. Union Pacific Railroad Co.,  
 240 U. S. 1,  
 Lynch vs. Hornby, 247 U. S. 339, 343,  
 Brady vs. Anderson, 240 Fed. 665,  
 U. S. vs. McHatton, 266 Fed. 602.

### III.

The effect of making the act retroactive to January 1, 1917, was to make it applicable to a corporation doing business after December 31, 1916, and dissolved prior to the passage of the act.

Florida Central R. R. Co. vs. Reynolds, 183  
 U. S. 471, 475.

Brady vs. Anderson, 240 Fed. 665.

United States vs. McHatton, 266 Fed. 602.

### IV.

The assets of a corporation, if its debts are not paid before dissolution, become a trust fund chargeable with the debts of the corporation.

Wood vs. Dummer, 3 Mason 308, Fed. Cas.  
 17944.

Mumma vs. The Potomac Company, 8 Pet.  
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Marr vs. The Bank of West Tennessee et al.,  
 4 Cald. 471, 479.

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Wabash St. Louis & Pacific R. R. Co. vs.  
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Pierce et al. vs. United States, 41 Sup. Ct. 365.

United States vs. McHatton, 266 Fed. 602.

People vs. National Trust Co., 82 N. Y. 282.

Marshall vs. People of State of New York, 41  
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First National Bank of Houston et al. vs.  
Ewing et al., 103 Fed. 168.

## V.

The stockholders' liability is several and may be enforced against one or more of the stockholders to the extent of the distributive share of the corporate assets actually received.

Pierce et al. vs. United States, 41 Sup Ct. 365.

United States vs. McHatton, 266 Fed. 602.

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Hastings vs. Drew, 76 N. Y. 9.

Volume 4, Thompson on corporations, Sec-  
ond Edition, Section 4926.



Fricks vs. Augemeier, 101 N. E. 329.

## VI.

The conclusion of the lower court as respects the question of fact is entitled on appeal to great weight and will not be reversed unless the complaining party succeeds in showing very clearly that it was erroneous and ought to be overruled.

Board of Commissioners vs. Irvine, 126 Fed. 689, 698.

Snider vs. Dobson, 74 Fed. 757.

Thallmann vs. Thomas, 111 Fed. 277.

The Order of United Commercial Travellers of America vs. McAdam, 125 Fed. 358.

## ARGUMENT.

### I.

Section 10, Title 2, Act of September 8, 1916, provides:

“That there shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized but not including partnerships, a tax of two per centum upon each income,      \*   \*   \*   \* ”

Section 4, Title 1, Act of October 3, 1917, provides as to the income tax in question as follows:

“That in addition to the tax imposed by subdivision (a) of Section ten of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, there shall be levied, assessed, collected, and paid a like tax of four per centum upon the income received in the calendar year nineteen hundred and seventeen and every calendar year thereafter, by every corporation, joint-stock company or associatin, or insurance company, subject to the tax imposed by that subdivision of that section, \* \* \* \*”

It will be seen from the above section that a tax is levied upon every corporation receiving income during the year 1917. The evidence in this case shows beyond a doubt that the Boss & Peake Automobile Company did business during the year 1917 and hence by the terms of the Act is a corporation which can be taxed. It will be seen that any retroactive feature of these proceedings is authorized by the express terms of the act itself. Therefore, the courts will sustain such retroactive operation, unless the provisions of the act are unconstitutional.

## II.

Prior revenue acts, which by their terms were retroactive, have been sustained as constitutional by the courts. It has been the practice of Congress in framing income tax laws and excise tax laws, when the measure of the tax was annual income, to make such laws retroactive to the first day of the year in which they were enacted. In the case of the first income tax law after the adoption of the sixteenth amendment to the constitution, the Act of October 3, 1913, Congress provided that it should be retroactive from a date soon after the adoption of the amendment. Such acts have been uniformly held not in derogation of the constitution, so far as retroaction was concerned. The authorities cited under Section 2 of the Points and Authorities amply sustain this contention. Since the decision of the Supreme Court in the case of *Stockdale vs. Insurance Companies*, 20 Wall 323, 331, the contention that Congress has no power to enact laws to operate retroactively is no longer open. It was said in that case that:

“The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, can not be doubted; much less can it be doubted that it could impose such a tax on the income of

the current year, though part of that year had elapsed when the statute was passed."

The foregoing language of the Court was quoted with approval by Mr. Chief Justice White in the case of *Brushaber vs. Union Pacific Railway Company*, 240 U. S. 1, at Page 20.

### III.

The effect of making the act retroactive to the first day of the year was to make it applicable to all persons, associations and corporations subject to the tax, who or which were living or in existence during any part of the taxable period. It is admitted that the Boss & Peake Automobile Co. was in existence as a corporation on January 1, 1917, and remained in existence until it was formally dissolved according to law on July 17, 1917. It is an undisputed fact that while it was in existence and doing business during the first part of the year 1917, it was in receipt of income to the amount reported by the agents of the Bureau of Internal Revenue. It is immaterial that the corporation was dissolved prior to the passage of the revenue act of 1917. It was subject to the Act for the time of its actual existence during the year. The Act, so far as the income and excess profits provisions were concerned, was in effect from the first

day of the year and every day during the year as long as the corporation remained in existence. In the case of the *United States vs. McHatton, et al.*, 266 Fed. 602, which was a case very similar to this, arising under the Revenue Act of 1916, the complaint alleged that a Montana Corporation sold all its property, distributed the proceeds to stockholders, including the defendants, and thereby became dissolved, owing taxes to the United States. Judge Bourquin in his opinion said:

"It was the corporation's duty to pay all taxes lawfully imposed upon it. Taxes can be thus imposed by retrospective law. *Brushaber vs. Railway Company*, 241 U. S. 20 \* \* \* The corporate duty of payment cannot be escaped by dissolution. *U. S. vs. Loading Co.*, 192 Fed. 223 \* \* \* *Brady Case*, 240 Fed. 665."

The Brady case, (*Brady et al. vs. Anderson*, 240 Fed. 665) referred to by the Court in the *McHatton* case, arose under the Income Tax Act of October 3, 1913. Anthony N. Brady died July 22, 1913, and his executors, in accordance with the requirements of the Commissioner of Internal Revenue, made a return of the income received by him between March 1, 1913, when the Act went into effect, and July 22, 1913, when he died. The executors paid the tax under



protest and sued for its recovery. The court directed a verdict for the defendant, and the plaintiff appealed to the Circuit Court of Appeals for the Second Circuit by writ of error. The judgment of the District Court was confirmed and the United States Supreme Court on May 21, 1917, refused to grant a writ of certiorari in this case. The Circuit Court of appeals in sustaining the decision of the District Court said:

“The effect of making the Act retroactive is, in our opinion, to apply it to Brady exactly as if it had been enacted March 1, 1913, and as, by reason of his death, he can not make a return. his executors, into whose hands his estate has come, must do so.”

#### IV.

The theory that former stockholders of a dissolved corporation, who have received the assets of the corporation upon the dissolution thereof, are liable for taxes due the United States is well established. It is a well settled principal in American law that the assets of a corporation, if its debts are not paid before dissolution, become a trust fund chargeable with the debts of the corporation. The so-called trust fund doctrine applied to corporations as formulated by Mr. Justice Story in *Wood vs. Dummer*, 3

Mason, 308, Fed. Cas. No. 17944, is now so generally accepted by the Courts that argument to show that it exists would be imposing upon this Court's time. One of the late decisions, which we will take the liberty of quoting, was rendered by Mr. Justice Brandeis in the case of *Pierce et al. vs. United States*, 41 Sup. Ct. 365, decided March 7, 1921, in which it was said:

"The law which sends a corporation into the world with a capacity to act, imposes upon its assets a liability for its acts. The corporation cannot disable itself from responding by distributing its property among its stockholders, and leaving remediless those having valid claims. In such a case the claims, after being reduced to judgments, may be satisfied out of the assets in the hands of the stockholders."

What is said of the assets of a dissolved corporation constituting a trust fund for the payment of the debts of the corporation, applies with equal force to unpaid taxes due from the corporation to the United States, for while taxes are no debt in the ordinary sense of the word, they are a higher form of obligation.

*Marshall vs. People of the State of New York*,  
41 Sup Ct. 143.

First National Bank of Houston et al. vs.  
Ewing et al., 108 Fed. 168.

## V.

The stockholders' liability is several and may be enforced against one or more of the stockholders to the extent of distributive share of the corporate assets actually received. By the weight of authority cited above, the liability of a stockholder of a dissolved corporation is not limited to a pro rata contribution toward the payment of the corporate debts, but extends to the distributive share of the corporate assets actually received. Following the trust fund doctrine, the foundation of the action is that certain of the corporate assets have been transferred to stockholders, who hold the same, upon the company being dissolved, under a constructive trust for the benefit of and subject to that relation and that consequently the liability is for the amount they received or in the case of unpaid stock subscriptions, the amount they are withholding, the creditors having the same right to pursue such assets as if they were still within the hands of the corporation. In such early cases as Railroad Company vs. Howard, 7 Wall 392; Mumma vs. Potomac Co., 8 Pet. 281 and Curran vs. Arkansas, 15 Howard, 304, we find dicta to the effect that the stockholder's liability should be limited to a pro rata

contribution toward payment of the debt. This doctrine has found no place in the decision of later cases where this question was actually at issue. It was undoubtedly based on the theory that this liability is a personal one determined by the proportionate holding of each stockholder to the entire stock in the corporation. The personal liability of a stockholder as such at law, which is determined almost everywhere by statute, has been confused with this liability under the trust fund doctrine which excludes all idea of personal liability of stockholders **as such**.

In *Fidelity Trust Company vs. McKeithen Lumber Company*, 212 Fed. 239, where the individual stockholders were sued by a creditor after the corporation had been dissolved and its assets distributed, the creditor was allowed to recover to the extent of the assets received by the stockholders in the distribution.

In the case of *Pierce vs. United States*, 257 Fed. 516, affirmed by the Supreme Court in 41 Sup. Ct. 365, where an oil company, pending criminal prosecution by the United States, which resulted in a judgment imposing a fine, sold all of its property and distributed the proceeds among its stockholders, the Circuit Court of Appeals affirmed the decree of the lower court holding stockholders liable in a creditor's bill

for the judgment against the corporation to the extent of their distributive shares of its funds. The entire trend of the decisions cited above is to the effect that stockholders who receive the assets of a corporation upon dissolution are severally liable for corporate debts to the extent of the funds or assets which they receive. This principal of law being true, this appellee having recovered a decree against the appellant Boss maintains therefore, that it is not imperative that the decree should also include the appellee Peake, even under the theory that Peake did receive a portion of the assets upon dissolution. That is a matter to be determined between Boss and Peake themselves and in which this appellee cannot be a party.

## VI.

It appears from the record that there is testimony introduced on behalf of both Boss and Peake which testimony is in part conflicting. The trial court has viewed the witnesses and their manner of testifying and it is a well established principle that where there is substantial evidence to support a finding of fact, that the finding made by the trial court will be given great weight and respect by the appellate court. In this case the appellee Peake has introduced testimony tending positively to show that he merely sold his



stock in the corporation to the appellant and that the transaction did not assume the nature of a dissolution and distribution of the assets.

Judge Wolverton in deciding the case obviously weighed the testimony given on both sides, and having had the opportunity to observe the witnesses and their manner of testifying, decided to give greater weight to the testimony of Peake. It is a well established principle that findings of fact by a trial court in an equity case are presumptively correct and will not be disturbed on appeal unless it appears that some serious mistake was made in the consideration of the evidence. In this connection may be cited the case of the Board of Commissioners vs. Irvine, 126 Fed. 689, 698, in which the court said:

"The findings thus challenged are findings of fact, and the rule is well established in this court by repeated decisions that the conclusion reached by a chancellor on a question of fact will be presumed to be correct, and will not be disturbed on appeal unless it appears that some serious mistake was made by the chancellor in the consideration of the evidence on which the conclusion was based. Even in chancery cases the conclusion of the lower court as respects questions of fact is entitled on appeal to great weight, and

will not be reversed unless the complaining party succeeds in showing very clearly that it is erroneous and ought to be overruled."

The argument as to questions of fact arising during the trial are amply covered by the brief of appellee E. W. A. Peake and will, therefore, not be duplicated in this brief.

It is, therefore, respectfully submitted that, disputed facts having been decided by the trial court against the appellant and there being no serious mistake on the part of the trial court appearing in the record, the decree of the court be sustained as rendered.

Respectfully submitted,

JOHN S. COKE,

United States Attorney for  
the District of Oregon.

THOS. H. MAGUIRE,

Assistant United States At-  
torney for the District of  
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Attorneys for Appellee, the  
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Service of three copies admitted this.....

.....day of.....1923.

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Attorney for Appellee.

E. W. A. PEAKE.

Service of three copies admitted this.....

.....day of.....1923.

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Attorneys for Appellant.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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HOFFSCHLAEGER COMPANY, LIMITED,  
Plaintiff in Error,  
vs.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,  
Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the Supreme Court of the  
Territory of Hawaii.

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**United States**  
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Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the Supreme Court of the  
Territory of Hawaii.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY DEFENDANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Application for Writ of Error**

To the Clerk of the Supreme Court of the Territory  
of Hawaii:

Please issue a writ of error in the above-entitled  
cause to the Clerk of the Circuit Court of the  
Fourth Judicial Circuit, Territory of Hawaii, on  
behalf of the defendant, Hoffschlaeger Company,  
Limited, as plaintiff in error herein, returnable to  
the Supreme Court.

Dated: Honolulu, T. H. November 23d, 1921.

HOFFSCHLAEGER COMPANY, LIMITED.

By Its Attorneys,

SMITH, WARREN & STANLEY.

[Endorsed]: #1360. In the Supreme Court of  
the Territory of Hawaii. Margaret Fraga, by Al-  
fred Fraga, Her Guardian ad Litem, Plaintiff-  
Defendant in Error, vs. Hoffschlaeger Company,  
Limited, Defendant-Plaintiff in Error. Appli-  
cation for Writ of Error. Received and filed in the  
Supreme Court November 23, 1921, at 3:13 o'clock  
P. M. J. A. Thompson, Clerk. Smith, Warren &



Stanley, Attorneys at Law, Bank of Hawaii Bldg.,  
Honolulu, T. H. [1\*]

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In the Supreme Court of the Territory of Hawaii.  
No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Assignment of Errors.**

Now comes Hoffschlaeger Company, Limited, the defendant in that certain suit above-entitled where-in Margaret Fraga, by Alfred Fraga, her guardian *ad litem*, is plaintiff and said Hoffschlaeger Company, Ltd., is defendant, heretofore brought and pending in the Circuit Court of the Fourth Judicial Circuit, at Law, and, as plaintiff in error herein, now say that in the record, rulings, orders and proceedings had in said cause before the Circuit Court of the Fourth Judicial Circuit, there are manifest and material errors; and the defendant as plaintiff in error having made application herein for a writ of error for the correction of said errors,

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\*Page-number appearing at foot of page of original certified Transcript of Record.

now assigns and specifies the following errors upon which it relies, to wit:

ASSIGNMENT OF ERROR No. 1.

That the Trial Court erred in overruling the suggestion of the disqualification of the Honorable J.W. Thompson, Judge of the Circuit Court of the Third Judicial Circuit of this Territory to preside at the trial of the cause, said suggestion of disqualification being duly filed by the defendant—plaintiff in error—on May 23, 1921, and prior to the impanelling of a jury [2] in the said cause, to which ruling the defendant—plaintiff in error—duly excepted, which exception was duly allowed and which ruling is hereby assigned as error.

ASSIGNMENT OF ERROR No. 2.

That the Trial Court erred in denying the motion of defendant—plaintiff in error—for the withdrawal of a juror and the entry of a mistrial in said cause, to which ruling the defendant—plaintiff in error—duly excepted, which exception was duly allowed and which ruling is hereby assigned as error.

ASSIGNMENT OF ERROR No. 3.

That during the cross-examination of one V. E. M. Osorio, a medical witness called for the plaintiff—defendant in error—and after said witness had testified during the course of his direct examination that the plaintiff—defendant in error—was suffering from an injury to her left leg below the knee known as a partial separation of the tubercle of the epiphysis of the tibia from the shaft of the tibia, and that such condition might

continue until the plaintiff—defendant in error—was between the ages of twenty and twenty-five years, and that he could not state anything certain about a complete cure at that time (Trans. of Ev., pp. 53-58), the following proceedings were had and testimony given:

“Q. And it was an injury such as you claim the plates in this case of the girl’s left knee show that you were speaking of yesterday, when you said that such an injury heals from three to five weeks?

“A. We expect it to heal.

“Q. And it is agreed among medical men that it usually heals about that time?

“A. It does not. Medical men do not claim that. We expect it to heal in three to five weeks, if it does heal. [3]

“Q. What do you mean, Doctor, by the expression you expect it to heal?

“A. Well, we expect it to because we figure it to be about the same formation as bone; bone takes three to five weeks to heal, we give it the same time to heal.

“Q. Have you any authority for that statement?

“A. Sajous; Cunningham; Rose and Carton and DeCosta.

“Q. Have you any of those authorities here?

“A. I have Sajous; De Costa, Cunningham, Rose and Carton.

“Q. Will you produce those, Doctor?

“A. I will have to go home and get them.

“Judge STANLEY.—I ask that witness be instructed to go home and get them, your Honor.

“Judge THOMPSON.—I will take that under advisement; that is intended as a motion: ‘that witness be instructed to produce them.’

“Judge STANLEY.—I now make a motion, if the Court please that the witness be instructed to produce in court the books of the authors whom he has mentioned so that counsel may have an opportunity of cross-examining the witness on the subject in question.

“Judge THOMPSON.—The Court denies the motion.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., 85–86.)

#### ASSIGNMENT OF ERROR No. 4.

That thereafter during the cross-examination of the said witness, the following proceedings were had and testimony given:

“Q. (Judge THOMPSON to witness.) Are those books counsel called for at his disposal?

“A. I can bring them, I have some at the house and some at the office, if at any time he wants to see them.

“Judge STANLEY.—Do I understand that your Honor refuses me permission to have those books produced by the witness, while the witness is on the stand? [4]



“Judge THOMPSON.—I have overruled the motion.

“Judge STANLEY.—I make this motion if the Court please: I renew my motion, stating as a grounds therefore, that I wish at this time, while the witness is on the stand to have him read the extracts from those books or refer to the extracts from those books, which cite as authorities for his statements that the injury known as a separation of the epiphysis of the tubercle does not usually heal until the tubercle becomes bone and is united to the shaft of the leg or tibia until from the twentieth to the twenty-fifth year.

“Judge THOMPSON.—The Court overrules the motion without comment.

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 86.)

#### ASSIGNMENT OF ERROR No. 5.

That thereafter during the cross-examination of the said witness, he having previously testified (Trans. of Ev., p. 100) that, the injury not having completely healed within three weeks, the plaintiff—defendant in error—was thereafter allowed to walk, the following proceedings were had and testimony given:

“Q. Is it not a fact, Doctor, that the mere allowing of her to walk around, merely with that adhesive plaster bandage on until the



tubercle had come back to its normal position, would retard the recovery?

"A. Not necessarily.

"Q. Would it ordinarily? A. No.

"Q. Would it under any circumstances?

"A. No.

"Q. Then what do you mean by saying, not necessarily?

"A. For this reason that after separation shows no complete healing at the end of three to four weeks, it is unnecessary to keep the patient in bed for recovery you will not get within that time, it will not surely develop at the end of nine months.

"Q. Doctor, if without keeping the girl in bed you had kept her at home and given the leg as much rest as possible would you not expect the recovery to be quicker than in the case of allowing her to walk around? [5]

"A. I do not.

"Q. Have you any authority, Doctor, to which you can refer, except your own, to the effect that if the injury is not healed within three or four weeks, it is not necessary and will serve no purpose to keep the injured part immobile?

"A. I will mention De Costa.

"Q. Have you De Costa with you?

"A. I have it over at the house.

"Q. And when you refer to De Costa, a surgical work published by De Costa, he is supposed to be a surgeon in Jefferson University?

“A. Yes.

“Q. And if you had De Costa could you refer us to the passage in what work to which you are using in support of your statement?

“A. Yes, sir.

“Q. (Judge STANLEY.) If the Court please I now renew my motion that the witness do procure the book to which he has referred, that I may be able—

“Judge THOMPSON.—The Court overrules the motion, for the reason that the Court allowed this witness to be questioned and even cross-questioned on his ability as a surgeon, in attempting to disqualify or qualify his statements.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., pp. 100–102.)

#### ASSIGNMENT OF ERROR No. 6.

That thereafter during the cross-examination of the said witness, he having previously testified that the chief muscle used in extending the leg is attached to the portion of the leg which in the case of the plaintiff—defendant in error—was alleged to have been injured (Trans. of Ev., pp. 102–103) the following proceedings were had:

“Q. You don’t mean to say, Doctor, that she would get well quicker by being allowed to walk and moving, and having some of the force felt on that muscle, than she would if she had not been allowed to walk?

“Judge THOMPSON.—That has been answered three or four times.” [6]

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 104.)

#### ASSIGNMENT OF ERROR No. 7.

That thereafter during the cross-examination of the said witness the following proceedings were had and testimony given:

“Q. Now, Doctor, the object a doctor has in view in treating an injury such as you prescribe in the plaintiff’s case is to prevent further separation of the tubercule, is it not?

“A. Yes.

“Q. And to allow the tubercule to get back to its former place?

“A. Yes.

“Q. And is it not a fact, Doctor, that every time that the plaintiff extended her leg the action of the quadriceps tendon tends to enlarge that separation and prevent—

“Mr. RUSSELL.—I object to that question as it has already been answered.

“Judge THOMPSON.—The Court sustains the objection.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 105.)

## ASSIGNMENT OF ERROR No. 8.

That thereafter during the cross-examination of the said witness the following proceedings were had:

“I will ask you, Doctor, is it not a fact that if you want to guard against any further separation and allow the tubercule to resume its normal position and to allow the patient to recover naturally, you must prevent in some way all action of the muscles on the injured part?

“Judge THOMPSON.—Need not answer that.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 105.) [7]

## ASSIGNMENT OF ERROR No. 9.

That thereafter during the cross-examination of the said witness the following proceedings were had and testimony given:

“Q. I will ask you, Doctor, if it is not recognized by leading medical and surgical authorities that the proper way to keep the leg in such a position that the muscle, quadriceps femoris, will not act on the injured part is to keep the leg by the use of splints or by a plaster of paris cast, or other cast, immobile up to a certain period.

“A. Yes, up to a certain period.

“Q. Up to what period?

“A. Three to four weeks; as high as five weeks.



“Q. Do you mean, Doctor, that irrespective of the condition in which the injury may be at the end of three or four weeks, medical authorities and surgeons, discontinue to use splints or casts.

“A. In what cases may I ask.

“Q. In cases of injuries of the nature you say the plaintiff had?

“A. Up to three or five weeks they do.

“Q. Is it not a fact, Doctor, that the leg should not be taken out of the splints or cast until the bone has healed or is rapidly healing?

“A. No, sir.

“Judge THOMPSON.—In his evidence there was no mention made of splints having been used, and the Court will ask that you direct your examination on different lines.”

“Judge STANLEY.—Is it your Honor’s ruling that I will not be allowed to examine the witness on the proper practice to be followed in attempting to heal an injury of the kind that the doctor said the patient is suffering from. May I ask your Honor to—

“Judge THOMPSON.—Judge Stanley, I am not undertaking your case.

“Q. I will ask you, Doctor, if, considering your testimony that you knew the nature of the injury to the tubercle both before and after the taking of the X-Ray picture of September 4th, the surest and safest method of securing a rapid and complete recovery of the



injured portion would not it be to adopt the use of a splint or cast continually?

“A. Not necessarily. [8]

“Q. Will you explain what you mean, not necessarily?

“A. In this case, as long as we can place the limb in an immobile position by placing obstructions on either side and having the leg properly bandaged tightly by not having a plaster cast or splints.

“Q. Do I understand that if you find at the end of three or four weeks the leg not healed that you can discard this splint or cast?

“Judge THOMPSON.—You need not answer that.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., pp. 105–107.)

#### ASSIGNMENT OF ERROR No. 10.

That thereafter during the cross-examination of the said witness the following proceedings were had:

“Q. Is it your opinion that if you find at the end of three or four weeks the leg does not heal that you can discard the splints or cast?

“Mr. RUSSELL.—I object to the question.

“Judge THOMPSON. — Objection sustained.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly

allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 107.)

#### ASSIGNMENT OF ERROR No. 11.

That thereafter during the cross-examination of the said witness the following proceedings were had:

“Do you mean, Doctor, that if the injury has not healed at the end of three or four weeks it would be useless to continue to keep the leg in splints for any further time?

“Mr. RUSSELL.—We object to the cross-examination; we have purposely avoided objecting in order that it would not seem as if we were trying to keep something away, and I think it should be limited. We object upon the ground that defendant has been permitted considerable latitude in the cross-examination of the witness upon the subject matter embodied in this particular question, and to permit further cross-examination upon this question would be—

“Judge THOMPSON.—Objection sustained.” [9]

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 107.)

#### ASSIGNMENT OF ERROR No. 12.

That thereafter during the cross-examination of the said witness, he having previously testified as follows:

“Q. Is it not a fact that every time she extended her leg that tendon was pulling on the injured part?

“A. We expected that by due counter-irritation to have a certain amount of bone tissue to heal it. With that protection she had on, it prevented a complete usage of that muscle that controls that ligament.” (Trans. of Ev., p. 103.)

the following proceedings were had:

“Q. You stated, Doctor, I think, that the allowing of the plaintiff to extend the, to walk about and extend her injured limb would not delay recovery because you expected by counter-irritation some bone tissue; please explain what you mean?

“Judge THOMPSON.—You need not answer the question.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 108.)

#### ASSIGNMENT OF ERROR No. 13.

That thereafter during the cross-examination of the said witness the following proceedings were had and testimony given:

“Q. Is it not a fact, Doctor, that an injured leg, has been up to date, and was during the time of your service in the expeditionary forces, kept in a sling or hammock so that the muscles affecting the injured part would not play upon it?

“Judge THOMPSON.—You need not answer that question.

“Q. (By Judge THOMPSON.) Doctor, have you given this girl such treatment as your experience, your ability, and medical science would dictate, under all circumstances?

“A. I have.

“Judge STANLEY.—I note an exception to the question [10] of the Court, on the ground that it does not call for the standard of treatment which the law requires, and that the witness can describe a treatment or give his conclusions.

“Judge THOMPSON.—Proceed.”

To which ruling defendant—plaintiff in error—  
noted an exception, which exception was duly  
allowed and which ruling is hereby assigned as  
error. (Trans. of Ev., p. 114.)

#### ASSIGNMENT OF ERROR No. 14.

That thereafter during the cross-examination of the said witness the following proceedings were had:

“Judge STANLEY.—I now renew my motion, if the Court please, that the Court instruct the witness to produce the authorities which he enumerated as supporting the position taken by him.

“Judge THOMPSON.—The Court overrules the motion.”

To which ruling defendant—plaintiff in error—  
noted an exception, which exception was duly



allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 115.)

#### ASSIGNMENT OF ERROR No. 15.

That thereafter during the recross-examination of said witness, he having previously on redirect examination mentioned Keene as an authority upon the proposition advanced by the witness that if the healing of such an injury as plaintiff—defendant in error—was alleged to have suffered was not effected from within three to five weeks you cannot expect a recovery until after some years, and having identified the book, present in the courtroom, to which he referred (Trans. of Ev., pp. 118 and 119) the following proceedings were had and testimony given:

“Judge STANLEY.—You have stated, Doctor, that Keene’s works support your statement that if the healing is not effected within three or four weeks, you cannot expect a recovery for some years?

“A. It was another authority I cited. [11]

“Q. You have cited Keene’s work on surgery as being an authority for the proposition that if the healing of an injury such as you say plaintiff suffered on August 20th was not effected within three to four weeks, it would not heal for years; will you please turn to the passage in Keene to which you have reference?

“Judge THOMPSON.—Shakes his head (indicating he would not allow the question).

“Judge STANLEY.—Your Honor refuses to allow it?



“Judge THOMPSON.—Getting beyond the rules of evidence.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 119.)

#### ASSIGNMENT OF ERROR No. 16.

That thereafter at the conclusion of the recross-examination of the said witness the following proceedings were had:

“Judge STANLEY.—I now move, if the Court please, to strike out all the evidence given by Dr. Osorio to the effect that the authorities named by him supported the proposition advanced by him, on the ground that the defendant has not been allowed to cross-examine the witness on that statement, and to have the books and authority referred to by the Doctor, De Costa, to enable counsel to cross-examine him.

“Judge THOMPSON.—The Court overrules the motion.”

To which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed and which ruling is hereby assigned as error. (Trans. of Ev., p. 122.)

#### ASSIGNMENT OF ERROR No. 17.

That the Court erred in overruling the defendant's motion for a nonsuit in said action made upon the ground that the plaintiff's—defendant in error—own evidence affirmatively showed such contributory negligence on her own part as to preclude

any recovery by her, to which ruling defendant—plaintiff in error—noted an exception, which exception was duly allowed [12] and which ruling is hereby assigned as error. (Trans. of Ev., p. 133.)

#### ASSIGNMENT OF ERROR No. 18.

That the Court erred in giving the jury, against the objection of the defendant—plaintiff in error—the following instruction (No. 4) requested by the plaintiff—defendant in error—to wit:

“You are also charged that it is not the law that a person passing along a sidewalk in a city, who has no knowledge of any defects therein, is required to be constantly watching for holes in or for obstructions upon, the walk, but he has the right to assume that the walk is in a reasonably safe condition and to act upon that assumption.”

and to the giving of which instruction defendant—plaintiff in error—duly excepted.

#### ASSIGNMENT OF ERROR No. 19.

That the Court erred in giving to the jury, against the objection of the defendant—plaintiff in error—the following instruction (No. 5) requested by the plaintiff—defendant in error—to wit:

“You are instructed that in the use of the elevator shaft in question the defendant was bound under the law to the exercise of reasonable care and diligence for the safety of such persons as had occasion to use the sidewalk over said shaft, and it is for you to determine whether in this case the defendant used due

diligence to protect the traveling public against falling into this open shaft. And upon the question as to whether defendant exercised reasonable care and prudence in this respect, you may consider the location of this shaft, whether the defendant could expect persons using the sidewalk while the shaft was open, whether or not defendant should have guarded or protected the opening so that persons passing along would not be likely to fall into it, and if so, whether defendant did so guard and protect said opening, and you may consider such other circumstances to be found in the evidence as will have a direct bearing upon this question.”

and to the giving of which instruction defendant—plaintiff in error—duly excepted.

#### ASSIGNMENT OF ERROR No. 20.

That the Court erred in giving to the jury, against [13] the objection of the defendant—plaintiff in error—the following instruction (No. 6) requested by the plaintiff—defendant in error—to wit:

“You are instructed that while the plaintiff was bound to use care for her own safety in walking along the sidewalk, the care required of her was not the highest degree of care or prudence, nor was it that degree of care that an unusually cautious man or a man of extraordinary prudence would have exercised, but the degree of care expected of the plaintiff was that which an ordinarily prudent person

would have exercised under similar circumstances. And in this connection you are charged that the fact merely that plaintiff's attention was diverted at the time of the injury does not establish contributory negligence as a matter of law."

and to the giving of which instruction defendant—plaintiff in error—duly excepted.

#### ASSIGNMENT OF ERROR No. 21.

That the Court erred in giving to the jury against the objection of the defendant—plaintiff in error—the following instruction (No. 7) requested by the plaintiff—defendant in error—to wit:

"Upon the question as to whether or not plaintiff was guilty of contributory negligence in failing to observe the opening into which she fell, you may consider the location of this shaft, the extent to which it covered the sidewalk, whether or not the sidewalk was on a business street, whether or not she acted reasonably in diverting her attention, if her attention was diverted, her age, and such other facts to be found in the evidence bearing upon this issue, and all in the light of the fact that she had a right to assume that the sidewalk was in a reasonably safe condition."

and to the giving of which instruction defendant—plaintiff in error—duly excepted.

#### ASSIGNMENT OF ERROR No. 22.

That the Court erred in giving to the jury, against the objection of the defendant—plaintiff



in error—the following instruction (No. 8) requested by the plaintiff—defendant in error—to wit:

“You are further instructed that the mere fact that plaintiff knew of the existence of this elevator shaft and failed [14] to avoid it or failed to look for it in passing to determine whether or not it was open at the time does not render her guilty of contributory negligence as a matter of law and will not as a matter of law preclude her from recovering.”

#### ASSIGNMENT OF ERROR No. 23.

That the Court erred in giving to the jury, against the objection of the defendant—plaintiff in error—the following instruction (No. 10) requested by the plaintiff—defendant in error—to wit:

“The Court further instructs the jury that she (the plaintiff) sued for pain and suffering, which she claims to have sustained. Now, that comes under the general head of pain and suffering. There is no mathematical measure given by law for this. You will ascertain from the evidence, if defendant is liable, how much pain and suffering, mentally and bodily has been undergone by plaintiff, and how much she will undergo, if the evidence discloses it. Then you will find for her what you, as impartial jurors, would find from the evidence to be fairly compensatory to her, but in no event in a sum in excess of the amount of \$11,500.”

#### ASSIGNMENT OF ERROR No. 24.

That the jury in said cause rendered a verdict in



favor of the plaintiff and against the defendant in the sum of Seven Thousand Two Hundred and Fifty Dollars (\$7250) to which verdict defendant—plaintiff in error—then and there excepted on the grounds that the same was contrary to the law and the evidence and the weight of the evidence and on the further ground that it was excessive, which exception was duly allowed and which ruling is hereby assigned as error.

#### ASSIGNMENT OF ERROR No. 25.

That on the first day of June, 1921, judgment in the said cause was entered in favor of the plaintiff and against the defendant—plaintiff in error—for the sum of Seven Thousand Two Hundred and Fifty Dollars (\$7250) and costs taxed at \$26.75, and thereafter the defendant—plaintiff in error—duly made a motion to vacate and set aside the said verdict and the said judgment and to grant a new trial of said cause, which motion the trial court on the 16th day of November, [15] 1921 denied; to which ruling exception was duly allowed and which ruling is hereby assigned as error.

WHEREFORE and in order that the foregoing assignment of errors may be and appear of record, the said defendant as plaintiff in error herein, now presents and files the same in this Honorable Court and prays that the same be considered and disposed of in accordance with law, and that the verdict rendered and entered in said cause be set aside, and the judgment thereon reversed.

Respectfully submitted this 23d day of November, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By Its Attorneys,

SMITH, WARREN & STANLEY.

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Assignment of Errors. Received and filed in the Supreme Court November 23, 1921, at 3:13 o'clock P. M. J. A. Thompson, Clerk. Smith, Warren & Stanley, Attorneys at Law, Bank of Hawaii Bldg., Honolulu, T. H. [16]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA,

Her Guardian *ad Litem*,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,

Defendant-Plaintiff in Error.

**Defendant's Bond on Writ of Error.**

(Under Section 2527, R. L. 1915, as amended by Section 6 of Act 44 Session Laws of 1919.)

KNOW ALL MEN BY THESE PRESENTS:

That Hoffschlaeger Company, Limited, an Ha-

waiian corporation, as principal, and Hartford Accident and Indemnity Company, a corporation duly organized under the laws of the State of Connecticut (authorized to do a surety business in the Territory of Hawaii, and having its Honolulu office with the American Factors, Limited, in Honolulu, in said Territory), as surety, are held and firmly bound unto Margaret Fraga, plaintiff-defendant in error, in the above-entitled cause, in the sum of Eight Thousand Dollars (\$8000) to be paid to the said Margaret Fraga or her heirs, executors or administrators, for the payment of which, well and truly to be made, they do hereby bind themselves and their respective successors firmly by those presents.

Signed and sealed at Honolulu, Territory of Hawaii, the 23d day of November, 1921.

THE CONDITION of the above obligation is such that whereas the above-named Margaret Fraga, as plaintiff in that certain action at law entitled Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant, did on the 1st day of June, 1921, recover a judgment in the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, against the said Hoffschlaeger Company, Limited, as defendant, in the sum of Seven Thousand Two Hundred Seventy-six and 75/100 Dollars (\$7,276.75) upon the verdict of a jury rendered in said action on the 27th day of May, 1921, and the said defendant, named as Principal on this bond, has, as plaintiff in error, made application

or is about to make application to the Clerk of the Supreme Court of the Territory of Hawaii for the issuance of a writ of error in said action:

NOW THEREFORE, if the said Hoffschlaeger Company, Limited, as defendant-plaintiff in error as aforesaid shall, in case of failure to sustain the said writ of error, pay to the said Margaret Fraga, plaintiff-defendant in error, or her heirs, executors or administrators, the judgment rendered against it in said original cause as aforesaid,—then this obligation shall be void; otherwise the same to remain in full force and virtue. [17]

IN WITNESS WHEREOF said Principal and Surety herein named have caused this instrument to be duly executed in their corporate names and behalf on this 23d day of November, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By R. F. LANGE, (Seal)  
Pres.

By H. G. DANFORD,  
Acting Tresr.-Secty.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By SHERWOOD M. LOWREY,  
Attorney-in-Fact.

[Endorsed]: No. 1360. In the Supreme Court for the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Defendant-Plaintiff in Error. Defendant's Bond on Writ of Error. Received and filed in the Supreme



Court, November 23, 1921, at 3:13 o'clock P. M.  
J. A. Thompson, Clerk. Smith, Warren & Stanley,  
Attorneys at Law, Bank of Hawaii Bldg., Honolulu,  
T. H. [18]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Praecipe for Transcript of Record.**

To the Clerk of the Circuit Court, of the Fourth  
Judicial Circuit, Territory of Hawaii:

Pursuant to the writ of error issued in the above-  
entitled cause you are hereby directed to transmit  
to the Supreme Court of the Territory of Hawaii  
the record in the above-entitled cause, including the  
documents hereinafter referred to:

- (1) Plaintiff's complaint for damages;
- (2) Defendant's answer to said complaint;
- (3) Suggestion of disqualification of Hon. J. W.  
Thompson;
- (4) Decision of Hon. J. W. Thompson on said  
suggestion;



- (5) Defendant's motion for withdrawal of juror and for entry of mistrial;
- (6) All affidavits and counter-affidavits filed in connection with said motion;
- (7) Decision of Hon. J. W. Thompson on said motion;
- (8) Verdict of jury;
- (9) Judgment for the plaintiff; [19]
- (10) Defendant's motion for new trial, together with all exhibits, affidavits and counter-affidavits filed in connection with said motion;
- (11) Decision of Hon. Homer L. Ross denying said motion for new trial;
- (12) Order denying said motion for new trial;
- (13) All exhibits received during the trial of said cause;
- (14) The requested instructions to the jury presented by the plaintiff-defendant in error;
- (15) The instructions to the jury as given by the Judge presiding at the trial of the said cause;
- (16) The transcript of the stenographer's notes of evidence adduced at the trial of said cause, together with the notes of exceptions taken and motions made by the defendant-plaintiff in error; and
- (17) The Clerk's minutes in said court and cause, including notes of exceptions taken by the defendant-plaintiff in error:

Dated: Honolulu, T. H., November 23d, 1921.

HOFFSCHLAEGER COMPANY, LIM-  
ITED,

By Its Attorneys,  
SMITH, WARREN & STANLEY.

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Praecipe. Received and filed in the Supreme Court, November 23, 1921, at 3:13 o'clock P. M. J. A. Thompson, Clerk. Smith, Warren & Stanley, Attorneys at Law, Bank of Hawaii Bldg., Honolulu, T. H. [20]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian *ad Litem*,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Acknowledgment of Service of Application for  
Writ of Error and Assignment of Errors.**

The undersigned hereby acknowledge the receipt this 28th day of November, 1921, from Messrs.

Smith, Warren & Stanley, attorneys for the defendant-plaintiff in error, of copy of the notice that on the 23d day of November, 1921, the defendant-plaintiff in error filed its application in the Supreme Court of the Territory of Hawaii for a writ of error in the above cause, and also of a copy of the assignment of errors relied upon by the defendant-plaintiff in error.

RUSSELL & PATTERSON,  
Attorneys for Margaret Fraga, Plaintiff-Defendant  
in Error.

Dated: Hilo, Hawaii, November 28th, 1921.

We hereby certify that an original notice & not "copy" of notice was served on Messrs. Russell & Patterson.

Nov. 29th, 1921.

SMITH, WARREN & STANLEY,  
Attys. for Deft.-Plaintiff in Error.

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Acknowledgment of Service, Filed November 29, 1921, at 10:00 A. M. J. A. Thompson, Clerk. [21]

In the Supreme Court of the Territory of Hawaii.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff-Defendant in Error.

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Writ of Error.**

The Territory of Hawaii, to the Clerk of the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

Application having been made on behalf of Hoffschlaeger Company, Limited, the defendant-plaintiff in error above named, for a writ of error in the above-entitled cause, you are commanded forthwith to send to the Supreme Court of the Territory of Hawaii the record in said cause in accordance with the praecipe, a copy of which is hereto attached.

WITNESS the Honorable S. B. KEMP, Associate Justice of the Supreme Court of the Territory of Hawaii this 23d day of November, 1921.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

Received the above writ of error on this 25th day of November, 1921, at 10:35 A. M.

A. K. AONA,  
Clerk of the Circuit Court of the Fourth Judicial  
Circuit, Territory of Hawaii.

To the Clerk of the Supreme Court:

The execution of the within writ of error appears by the record hereto annexed.

Dated, Hilo, Hawaii, December 9, 1921.

[Seal] A. K. AONA,  
Clerk of the Circuit Court of the Fourth Judicial  
Circuit, Territory of Hawaii. [22]

In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error,

PRAECIPE FOR TRANSCRIPT OF RECORD.  
To the Clerk of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii:

Pursuant to the writ of error issued in the above-entitled cause you are hereby directed to transmit to the Supreme Court of the Territory of Hawaii



the record in the above-entitled cause, including the documents hereinafter referred to:

- (1) Plaintiff's complaint for damages;
- (2) Defendant's answer to said complaint;
- (3) Suggestion of disqualification of Hon. J. W. Thompson;
- (4) Decision of Hon. J. W. Thompson on said suggestion;
- (5) Defendant's motion for withdrawal of juror and for entry of mistrial;
- (6) All affidavits and counter-affidavits filed in connection with said motion;
- (7) Decision of Hon. J. W. Thompson on said motion;
- (8) Verdict of jury;
- (9) Judgment for the plaintiff;
- (10) Defendant's motion for new trial, together with all exhibits, affidavits and counter-affidavits filed in connection with said motion;
- (11) Decision of Hon. Homer L. Ross denying said motion for new trial; [23]
- (12) Order denying said motion for new trial;
- (13) All exhibits received during the trial of said cause;
- (14) The requested instructions to the jury presented by the plaintiff-defendant in error;
- (15) The instructions to the jury as given by the Judge presiding at the trial of the said cause;

- (16) The transcript of the stenographer's notes of evidence adduced at the trial of said cause, together with the notes of exceptions taken and motions made by the defendant-plaintiff in error; and
- (17) The Clerk's minutes in said court and cause, including notes of exceptions taken by the defendant-plaintiff in error:

Dated: Honolulu, T. H., November 23d, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By Its Attorneys,

(Sgd.) SMITH, WARREN & STANLEY.

[Endorsed]: #1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Writ of Error. Filed and Issued November 23, 1921, at 3:13 P. M. J. A. Thompson, Clerk. Returned December 17, 1921, at 9:50 A. M. J. A. Thompson, Clerk. [24]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian *ad Litem*,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LTD.,

Defendant.

**Bill of Complaint.**

To the Honorable CLEMENT K. QUINN, Judge  
of the Circuit Court in and for the Territory  
of Hawaii:

The petition of the above-named plaintiff respectfully shows and presents to this Court the following facts:

That Margaret Fraga is a minor of the age of thirteen years, and that Alfred Fraga, the above-named guardian *ad litem* is the father of said child and was duly and legally appointed guardian *ad litem* of said minor for the purpose of instituting this action on the 3d day of December, 1920, and before the filing of this complaint.

That the above-named defendant is now and during all of the time mentioned in this complaint has been a corporation duly organized and existing under and by virtue of the laws of the Territory of Hawaii.

That said defendant carries on a general wholesale business on Keawe Street, in the City of Hilo,

County and Territory of Hawaii, between Shipman Street and Waianuenue Avenue, and maintains and operates in front of its said premises on said Keawe Street in the public sidewalk a sidewalk elevator which is used for the [25] purpose of carrying goods from the basement of said defendant's place of business to the sidewalk and at the top of said elevator there is an opening in said sidewalk approximately four feet in width and five feet in length.

That when said opening is closed the doors lay even with the sidewalk and become a part and portion of the sidewalk and are used by pedestrians for the purpose of walking on said sidewalk.

That on or about the 20th day of August, 1920, this plaintiff was walking along said sidewalk from Waianuenue Avenue and proceeding toward Shipman Street and that on said date and at the time and place while plaintiff was so walking along said Keawe Street, the defendant carelessly and negligently without due regard to the public who were then and there using said sidewalk permitted and allowed one door of said opening to remain open while the said elevator was at the bottom of the shaft about ten feet from the level of the sidewalk.

That while plaintiff was so walking along said sidewalk she, the said plaintiff, fell into the said opening and fell to the bottom of said shaft and was greatly injured by said fall in the following respects:

That plaintiff suffered a laceration of her upper eyelid; abrasion of her left elbow and right arm;

abrasion of right forearm; injury to right hip and left hip; strained her back; fracture of epiphysiolysis of tibia left leg; strained right foot; injury to right knee, and concussion of the head.

That said injuries so received by this plaintiff were wholly due to the carelessness and negligence of said defendant in allowing and permitting said opening in said sidewalk to remain open and unguarded, the plaintiff being then and there wholly [26] unaware of any danger and was caused without fault or negligence on the part of this plaintiff.

That by reason of said accident this plaintiff was rendered sick, sore and lame and has suffered and will continue to suffer great and grievous mental and physical pain and anguish and will for a long time continue to suffer great and grievous mental and physical pain and anguish until such time as the wounds and injuries received by her have completely healed.

That by reason of said injuries this plaintiff has and is damaged in the sum of \$11,500.00.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of \$11,500.00, together with interest and costs of suit.

MARGARET FRAGA.

By \_\_\_\_\_,

(Sgd.) ALFRED FRAGA,

Her Guardian *ad Litem*.

(Sgd.) RUSSELL & PATTERSON,

Attorneys for the Plaintiff.



Territory of Hawaii,  
County of Hawaii,—ss.

Alfred Fraga, being first duly sworn upon oath deposes and says: That he is the duly qualified and acting guardian *ad litem* of the plaintiff in the foregoing complaint; that he has read the said complaint, knows the contents thereof and that the same is true.

(Sgd.) ALFRED FRAGA.

Subscribed and sworn to before me this 3d day of December, 1920.

[Seal] (Sgd.) FRED PATTERSON,  
Notary Public, Fourth Circuit, Territory of Hawaii. [27]

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In the Circuit Court of the Fourth Circuit, Territory of Hawaii,

Holding Terms at Hilo, County of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Term Summons.**

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the County of Hawaii, or His Deputy:

YOU ARE COMMANDED to summon Hoffschlaeger Co., Ltd., defendant, in case it shall file written answer within twenty days after service hereof to be and appear before the said Circuit Court at the term thereof pending immediately after the expiration of twenty days after service hereof; provided, however, if no term be pending at such time, then to be and appear before the said Circuit Court at the next succeeding term thereof, to wit, the January Term thereof, to be holden at Hilo, County of Hawaii, on Wednesday, the —— day of January next, at 10 o'clock A. M., to show cause why the claim of Margaret Fraga, plaintiff, should not be awarded to her pursuant to the tenor of her annexed complaint. And have you then there this writ with full return of your proceedings thereon.

WITNESS the Honorable CLEMENT K. QUINN, Judge of the Circuit Court of the Fourth Circuit, at Hilo, Hawaii, this 3d day of December, 1920.

[Seal]

(Sgd.) T. J. RYAN,  
Clerk.

Served the within summons on Hoffschlaeger Co., Ltd., therein named as defendant, at Honolulu, City and County of Honolulu, Territory of

Hawaii, this 27th day of December, A. D. 1920, by delivering to R. F. Lange, its president, a certified copy hereof and of the petition, order and complaint annexed hereto and at the same time showing him the original.

Dated at Honolulu, City and County of Honolulu, Territory of Hawaii, this 27th day of December, A. D. 1920.

(Sgd.) PATRICK GLEASON,  
Deputy High Sheriff, T. H.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court, Fourth Circuit. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Term Summons. Issued at 10:20 o'clock A. M., December 3, 1920. (Sgd.) T. J. Ryan, Clerk. Returned at 9 o'clock A. M., December 31, 1920. (Sgd.) T. J. Ryan, Clerk.

R. F. Lange, Pres. (27)

Received at 9:20 o'clock A. M., December 21, 1920.

(Sgd.) H. K. MARTIN,  
Deputy Sheriff, County of Hawaii.

Received 9 A. M., December 26, A. D. 1920.  
High Sheriff's Of.

(Sgd.) P. GLEASON,  
Deputy High Sheriff. [28]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFERD FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Answer of Defendant.**

Comes now the defendant, by its attorneys, Smith, Warren & Stanley, and for answer to the plaintiff's complaint in the above-entitled cause says that it denies each and every allegation therein contained.

Dated: Honolulu, T. H., January 12th, 1921.

HOFFSCHLAEGER COMPANY, LIM-  
ITED,

By SMITH, WARREN & STANLEY,  
Its Attorneys.

[Endorsed]: L. No. 791. Doc. 3, p. 213. Circuit Court, Fourth Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Answer of Defendant. Filed at 11:20 o'clock A. M., January 13, 1921. (Sgd.) Irma Patten, Clerk. [29]

In the Circuit Court of the Fourth Circuit, Territory of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Suggestion of Disqualification of the Honorable  
J. W. Thompson as Judge in this Cause.**

Comes now the defendant Hoffschlaeger Company, Limited, and specifically appearing herein by its attorneys Messrs. Smith, Warren & Stanley, and suggest the disqualification of the Honorable J. W. Thompson, Judge of the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii to preside at the trial of the above-entitled cause or enter any order or judgment therein for the reasons following, to wit:

That the term of the Honorable Clement K. Quinn as Judge of said Fourth Circuit Court expired on the 4th day of March, A. D., 1921, and since said last-named date there has been no qualified Judge of said Fourth Circuit Court;

That the request of the Chief Justice and/or the Supreme Court of the Territory of Hawaii that the said Honorable J. W. Thompson act temporarily as Judge of the Fourth Circuit Court of said Territory is illegal and not authorized by statute, and the said Chief Justice and/or the Supreme Court had no jurisdiction to make said



request of to authorized the said Honorable J. W. Thompson to act as said Judge.

HOFFSCHLAEGER COMPANY, LIMITED,

By (Sig.) SMITH, WARREN & STANLEY,  
Its Attorney.

By \_\_\_\_\_.

[Endorsed]: L. No. 791. Doc. 3, pg. 213.  
Margaret Fraga, by Alfred Fraga, Her Guardian  
*ad Litem*, Plff., vs. Hoffschlaeger Company, Ltd.,  
Deft. Suggestion of Disqualification of the Hon-  
orable J. W. Thompson as Judge in this Cause.  
Filed at 10:10 o'clock A. M., May 23, 1921. (Sig.)  
Thomas Pedro, Jr., Asst. Clerk. [30]

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In the Supreme Court of the Territory of Hawaii.

In the Matter of a SUBSTITUTE JUDGE IN  
THE FOURTH CIRCUIT.

**Appointment of Honorable J. Wesley Thompson  
to Preside as Judge of Fourth Circuit Court.**

To the Honorable J. WESLEY THOMPSON,  
Judge of the Circuit Court of the Third Judi-  
cial Circuit, Territory of Hawaii.

Owing to a vacancy existing in the office of Judge  
of the Circuit Court of the Fourth Judicial Cir-  
cuit of the Territory of Hawaii, I hereby request  
and authorize you to preside at the trial of any  
cause or causes pending in the Circuit Court of  
the Fourth Circuit, or in Chambers in such circuit.

WITNESS MY HAND and the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County Honolulu, this 5th day of March, A. D. 1921.

(Signed) JAMES L. COKE,  
Chief Justice of the Supreme Court of the Territory of Hawaii.

[Seal] Attest: (Signed) J. A. THOMPSON,  
Clerk Supreme Court.

[Endorsed]: Appointment of Honorable J. Wesley Thompson to Preside as Judge of the Fourth Circuit Court. Filed at 9:15 o'clock A. M., March 9, 1921. (Signed) T. J. Ryan, Clerk. [31]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Court's Decision and Ruling on Motion.**

The defendant by its attorneys filed in this court what it, the defendant, was pleased to call a "Suggestion of Disqualification" of the Judge now presiding in said Fourth Circuit Court.

The Court will treat this so-called suggestion in every particular as a motion and as if it had been so labeled and tabulated.

Section 2277 of the Revised Statutes of Hawaii, the 1915 Edition, sets out and defines fully the method and plan by which a vacancy in any of the Circuit Courts of the Territory, or the disqualification of any Judge to preside may be filled or supplied.

It is a matter of record that the Fourth Judicial Circuit is now without a regular qualified Judge to preside.

There is on file in this court a written request and special commission signed by the Hon. James L. Coke, Chief Justice of the Supreme Court of the Territory of Hawaii, addressed to J. W. Thompson delegating him, the said J. W. Thompson to preside in said Fourth Judicial Circuit.

It is also a matter of record that the said J. W. Thompson is a regular and duly qualified Judge and commissioned as such of the Third Judicial Circuit, Territory of Hawaii.

IT IS THEREFORE the opinion of the Court that every provision of the statute has been fully met and complied with.

The motion is therefore overruled.

This May 24, 1921.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. In  
the Circuit Court of the Fourth Judicial Circuit

Territory of Hawaii. January Term A. D. 1921.  
Margaret Fraga, by Alfred Fraga, Her Guardian  
*ad Litem*, Plaintiff, vs. Hoffschlaeger Company,  
Ltd., Defendant. Court's Decision and Ruling on  
Motion. Filed at 9:00 o'clock A. M. May 24, 1921.  
(Sgd.) T. J. Ryan, Clerk. [32]

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In the Circuit Court of the Fourth Judicial Cir-  
cuit, Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,

**Motion of Defendant for Withdrawal of Juror and  
Entry of Mistrial.**

To the Honorable Presiding Judge of said Court:

Comes now Hoffschlaeger Company, Limited,  
defendant above named, by its attorneys Smith,  
Warren & Stanley and Charles F. Parsons, and  
moves that your Honor withdraw a juror and  
enter a mistrial in the above-entitled cause for  
the reasons following: That on the afternoon of  
Tuesday, May 24th, 1921, there was published in  
"The Daily Post-Herald," a newspaper of general  
circulation in the City of Hilo and the District of  
South Hilo, Island of Hawaii, and generally  
throughout said Island, and under display head-



ing in the first two columns on the front page of said newspaper (a copy of which said newspaper published on said 24th day of May, 1921, is hereto attached marked Exhibit "A," and made a part hereof), a certain article containing certain false, misleading and prejudicial statements regarding the defense of said cause, and that the said newspaper and the said article therein contained has been given wide circulation and has been accessible to the jurors impaneled and sworn in said cause, to the manifest and irreparable injury and prejudice of the defendant herein. [33]

This motion is based upon the affidavit of W. L. Stanley hereto attached, upon the files and records in this cause, and upon such evidence as may be adduced at the hearing hereof.

Dated, Hilo, Hawaii, May 25th, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By (Sgd.) SMITH, WARREN & STANLEY,  
(Signed) CHARLES F. PARSONS,  
Its Attorneys.

By \_\_\_\_\_. [34]

### **Exhibit "A."**

#### **FOURTEEN-YEAR-OLD HILO GIRL SEEKS \$11,500 DAMAGES FROM INSURANCE FIRM FOR INJURIES.**

Pretty Miss Margaret Fraga, fourteen-year-old Hilo school girl, fell down a sidewalk elevator shaft, owned by the Hoffschlaeger Company, Ltd., last August.



When her case was called in the Circuit Court this morning she asked for \$11,500 damages for injuries which she declares she suffered from her fall, from which she declares that she has never entirely recovered.

Shortly before noon, the trial jury was completed and the beginning of testimony will start when court convenes this afternoon.

#### Unusual Circumstances.

The circumstances surrounding the case are rather unusual. According to the Insurance company, which is defending the case for the defendant, it is admitted that Miss Fraga was walking along Keawe street and fell down the elevator shaft, but they declare that the complainant did not suffer serious injuries. It is reported that the Insurance company, at the time of the accident, agreed to settle for a small amount of damages. It is admitted that half of the iron grating, which was supposed to cover the shaft, was left unguarded.

Miss Fraga declares that her injuries, both physical and mental, were so serious that she has not entirely recovered. The twelve men who were selected to hear the evidence in the case are as follows: James Davis, George H. Akau, John Kahiawi, Antone J. Kimi, James Kauhulaqua, Charles Johnson, T. O. Mitchell, E. B. Hamauku, A. Arasuda, S. K. Maka, E. A. Namohala, and Harry Hapai.

#### Questions Jurisdiction.

Judges William L. Stanley and Charles F. Parsons are appearing for the Insurance company,

who are shouldering the responsible for the Hoffschlaeger company. It is expected that this case will require two days.

Yesterday, when the case was first called, Judge W. L. Stanley filed a motion that Judge Thompson had no jurisdiction to hear this case. The motion was overruled and the case continued until this morning. [35]

**Affidavit of W. L. Stanley.**

Territory of Hawaii,

Fourth Judicial Circuit,—ss.

W. L. Stanley, being first duly sworn, on his oath says:

That he is one of the attorneys for Hoffschlaeger Company, Limited, defendant herein; that on the 24th day of May, 1921, a jury was impaneled and sworn to try said cause and on the afternoon of the said day the plaintiff began the introduction of evidence before said jury in support of plaintiff's declaration therein.

That on the afternoon of said last-named day, while said cause was still on trial before said jury, there appeared in "The Daily Post-Herald," a newspaper, under a display heading, and in a prominent part of the first page thereof, the following purported report of and concerning said cause then on trial before said jury, to wit:

**"FOURTEEN-YEAR-OLD HILO GIRL SEEKS  
\$11,500 DAMAGES FROM INSUR-  
ANCE FIRM FOR INJURIES.**

Pretty Miss Margaret Fraga, fourteen year old Hilo school girl, fell down a sidewalk elevator

shaft, owned by the Hoffschlaeger Company, Ltd., last August.

When her case was called in the Circuit Court this morning she asked for \$11,500 damages for injuries which she declares she suffered from her fall, from which she declares that she has never entirely recovered.

Shortly before noon, the trial jury was completed and the beginning of testimony will start when court convenes this afternoon.

#### Unusual Circumstances.

The circumstances surrounding the case are rather unusual. According to the Insurance Company, which is defending the case for the defendant, it is admitted that Miss Fraga was walking along Keawe street and fell down the elevator shaft, but they declare that the complainant did not suffer serious injuries. It is reported that the Insurance Company, at the time of the accident, agreed to settle for a small amount of damages. It is admitted that half of the iron grating, which was supposed to cover the shaft, was left unguarded. [36]

Miss Fraga declares that her injuries, both physical and mental, were so serious that she has not entirely recovered. The twelve men who were selected to hear the evidence in the case are as follows: James Davis, George H. Akau, John Kahiwai, Antone J. Kimi, James Kauhulaqua, Charles Johnson, T. O. Mitchell, E. B. Hamauku, A. Arasuda, S. K. Maka, E. A. Namohala, and Harry Hapai.

## Questions Jurisdiction.

Judges William L. Stanley and Charles F. Parsons are appearing for the Insurance Company, who were shouldering the responsible for the Hoffschlaeger company. It is expected that this case will require two days.

Yesterday when the case was first called, Judge W. L. Stanley filed a motion that Judge Thompson had no jurisdiction to hear this case. The motion was overruled and the case was continued until this morning."

A copy of said issue of said newspaper containing said article is hereto attached and made a part hereof.

That the said article is misleading, false and prejudicial to the rights of the defendant herein in the following respects and for the following reasons, to wit:

That the said action is not against any insurance firm, but against the corporation of Hoffschlaeger Company, Limited; that no unusual circumstances surround the case; that neither defendant nor any insurance company, so far as known to affiant, has declared that Miss Fraga did not suffer serious injury; that no insurance company, so far as known to affiant, agreed to settle for a small, or any amount of damages; that neither W. L. Stanley nor his firm, nor Charles F. Parsons are appearing herein for any insurance company, nor is any insurance company a party to this cause.

That the statement that an insurance company is shouldering the responsibility for Hoffschlaeger



Company, Limited, is true only to the extent that Hoffschlaeger Company, Limited, carry accident and indemnity insurance to an amount far less than the amount herein prayed by plaintiff as damages in the said cause.

That no testimony regarding said insurance company has been admitted, or is admissible in evidence in the trial of said cause. [37]

That the said article first came to the attention of affiant and the said Charles F. Parsons after the adjournment of the court and at about the hour of 6:30 P. M., May 24th, 1921.

That affiant is informed and believes, and upon such information and belief avers that said newspaper is a newspaper of a guaranteed general circulation of 1450 copies, printed and published in Hilo, Hawaii, mailed and delivered to subscribers and for sale daily at the news stands and elsewhere throughout the Island and Territory of Hawaii, and easily accessible to the jurors before whom said cause is now being tried.

That the President of the Hawaii Post-Herald, Limited, the corporation owning and publishing said newspaper, is James W. Russell, Esq., leading counsel for plaintiff in said cause, who is also one of the leading stockholders of said company and the reputed dictator of the policies of said newspaper.

That the said article is highly prejudicial to the rights of defendant herein, and for said reasons affiant believes that defendant cannot now safely proceed with the trial of said cause before said



jury, and that the injury and prejudice to the rights of the defendant occasioned by said article, would and could not be cured by any cautionary instruction to the jury.

(Sgd.) W. L. STANLEY.

Subscribed and sworn to before me this 25th day of May, A. D. 1921.

[Seal] (Signed) B. C. STEWART,

Notary Public, Fourth Judicial Circuit, Territory of Hawaii.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court, Fourth Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Motion of Defendant for Withdrawal of Juror and Entry of Mistrial. Filed at 9:24 o'clock A. M., May 25, 1921. (Sgd.) Thomas Pedro, Jr., Asst. Clerk. [38]

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In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Affidavit of J. W. Russell.**

Territory of Hawaii,  
County of Hawaii,—ss.

J. W. Russell, being first duly sworn, on oath says: That he is one of the attorneys for the plaintiff in the above-entitled cause.

That he read the report published in the "Daily Post-Herald" of May 24, 1921, referred to in the affidavit of W. L. Stanley, Esq., after the said paper had been printed and published, and that he had no knowledge whatsoever prior to the publication of said paper that said article or any reference whatsoever to this case would be published in said paper.

That after the publication of said article your affiant ascertained that the same was prepared and written by one Harold Russell, and your affiant thereupon interviewed said Harold Russell who informed your affiant that the information as to the fact that an insurance company was defending the case and was responsible for any verdict that may be rendered against the defendant and that an offer had been made by the insurance company to the plaintiff was obtained from an interview had by the affiant with one, Karl J. Meinke, who at all times mentioned in the complaint and still is the Manager of the Hilo Branch of the defendant.

Your affiant further says that he is not connected with the active management of the said "Post-Herald," and that he did not know of any news or other article published in said newspaper in ad-

vance of the publication of said paper, and that your affiant does not assume to dictate the character of the news, which should be published in said paper. That as President of the said "Post-Herald," your affiant interests himself solely with respect to the financial policy of said company, and that the said company employs a manager and editor who has charge of the active management of the administrative affairs of said company.

(Signed) J. W. RUSSELL.

Subscribed and sworn to before me this 25th of May, 1921.

(Sgd.) FRED PATTERSON,

Notary Public, Fourth Circuit, Territory of Hawaii.

(S.) [39]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALBERT FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LIMITED,

Defendant.

**Affidavit of Harold Russell.**

Territory of Hawaii,

County of Hawaii,—ss.

Harold Russell, being first duly sworn, on oath

says: That he is employed by the Hawaii Post-Herald, Limited, as a reporter upon the "Daily Post-Herald," a newspaper published by said company, and that he wrote the article appearing in the issue of said paper of May 24, 1921, relating to the case of Fraga vs. Hoffschlaeger Co.

That all of the information that he had which formed the basis of said article was gathered by him from two interviews had with Karl J. Meinke, the Hilo manager of said defendant. That at the first of said interviews had a few days ago, the said Meinke informed your affiant that said defendant was not concerned about any possible results in this case because of the fact that it carried insurance against liability in such cases and that the insurance company had offered the plaintiff one thousand (\$1,000.00) dollars in settlement of said case but that the plaintiff had refused to accept such offer. That upon the occasion of said interview had with said Meinke in the forenoon of said 24th day of May, your affiant asked the said Meinke why he was not present in Court at the trial of the case, and the said Meinke replied to affiant in effect that it was up to the attorneys for the insurance company who were representing the defense to call him if his presence should be desired, and thereupon affiant asked the said Meinke as to whether he expected to be called as a witness, to which the said Meinke replied that he did not believe so as there was no dispute as to the facts of the accident, the said Meinke further stating to affiant that it was admitted that the girl fell in the



elevator shaft in question and that she was injured, and said Meinke further stated to affiant that the only issue involved was the matter of damages, the insurance company contending that she was not injured as seriously as was claimed by the plaintiff. That affiant had no knowledge from any other source of the facts of said case, except that he ascertained the names of the jurors from another reporter, Mrs. Beth Fox, whom affiant sent to the Court for the purpose of ascertaining the names of the jurors.

Affiant further says that said Meinke at the time of each interview knew that he, the affiant, was a reporter for the said "Post-Herald," and that the information given was [40] for the purpose of publication as a news article for the said "Post-Herald." Affiant further says that neither of the counsel for the plaintiff knew in advance of the publication of said article that said article would be so published.

(Signed) HAROLD RUSSELL.

Subscribed and sworn to before me this 25th day of May, 1921.

(Signed) FRED PATTERSON.

Notary Public, Fourth Circuit, Territory of Hawaii.

(S.)

[Endorsed]: L. No. 791. Doc. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoff-



schlaeger Company, Ltd., Defendant. Damages.  
Affidavits of J. W. Russell and Harold Russell.  
Filed at 1:30 o'clock P. M., May 25, 1921.  
(Signed) T. J. Ryan, Clerk. Russell & Patterson,  
Attorneys for Plaintiff. [41]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LTD.,

Defendant.

**Counter-Affidavit of W. L. Stanley.**

City of Hilo,

Island and Territory of Hawaii,—ss.

W. L. Stanley, being duly sworn, on oath deposes  
and says that he has read the affidavit of Harold  
Russell, filed on the 28th day of May, A. D. 1921,  
wherein the said Russell states *inter alia*, that he  
was informed by Karl Meinke that

“the Insurance Company had offered the  
plaintiff \$1,000.00 in settlement of said case  
but that the plaintiff had refused to accept  
such offer.”

and in reply to said statement, of said Russell,  
affiant says that, he, affiant, since about the 30th  
day of August, 1920, had sole charge on behalf of  
the defendant corporation, and of the Insurance

Company, in part indemnifying the same, of all matters arising out of the accident to the plaintiff on the 20th day of August, 1920, and connected with the above-entitled cause.

That affiant had no acquaintance with, or correspondence with said Meinke or any officer or employee of the Branch House of [42] Hoffschlaeger Co., Lt., in Hilo, until his arrival in Hilo on the 22d instant.

That no offer of settlement, and no proposal of settlement was at any time made to the plaintiff or to her attorneys, or to any other person, save immediately as hereinafter stated.

That on or about August 30, 1920, a letter was written by Fred Patterson, Esq., on behalf of the firm of Russell & Patterson to Hoffschlaeger Company, Ltd., in Hilo, in which it was stated that his firm had been consulted by Mr. Alfred Fraga, with reference to the accident and with a view to recovering damages therefor, and that his firm would be pleased to be informed whether or not some amicable adjustment could be made; that said letter was forwarded to affiant, and that affiant on or about September 4th wrote to Messrs. Russell & Patterson asking them to withhold action for a reasonable time in order to allow affiant to make an investigation into the matters involved, and that on or about September 9th, affiant received a reply acceding to his request.

That towards the end of September affiant had an interview with said Fred Patterson, Esq., at affiant's office in Honolulu, in the course of which

affiant, in response to an inquiry of Mr. Patterson's, as to whether affiant's request for delay had been made in good faith, assured him of that fact, and inquired of Mr. Patterson, what his ideas were or what would constitute a reasonable settlement, and that Mr. Patterson mentioned the figure \$5,000.00.

That subsequently, and about the end of October affiant had another interview with Mr. Patterson in Honolulu, in which the latter again stated to affiant that his lowest figure was \$5,000.00, and in the course of which interview, affiant stated that, in view of what he, affiant, had learned of the circumstances of the accident and of the injuries sustained by plaintiff, the utmost he could recommend by way of settlement would be \$1,000.00. [43]

That the disparity between said two sums of \$1,000.00 and \$5,000.00, was so great, there was no possibility of settlement, and that in view of Mr. Patterson's demand, and its unreasonableness in the opinion of the affiant, the fact that the sum of \$1,000.00 or any other sum had been mentioned by affiant to Mr. Patterson, was never communicated at any time by affiant to the defendant corporation, or any of its officers or employees, or to the Insurance Company, or any of its officers or employees, or to any other person, save and except to C. S. Parsons, Esq., and to him only, after affiant had received and read the affidavit of said Harold Russell filed in the above case as aforesaid.

(Signed) W. L. STANLEY.

Subscribed and sworn to before me this 26th day of May, A. D. 1921.

[Seal] (Signed) B. C. STEWART,  
Notary Public, Fourth Judicial Circuit, Territory  
of Hawaii. [44]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Counter-Affidavit of Karl J. Meinke.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

Karl J. Meinke, being first duly sworn, on his oath says:

That he has read the affidavits of James W. Russell and Harold Russell on file herein; that affiant did not, in an interview a few days ago, or at any other time, inform the said Harold Russell that the defendant was not concerned about any possible results in the above-entitled cause, or that the insurance company had offered the plaintiff herein One Thousand Dollars, or any other sum, in settlement of said cause; or that the plaintiff had refused to accept such offer, or any other offer, or



that the only issue involved was the matter of damages, or that the insurance company contended that Margaret Fraga was not injured as seriously as was claimed by the plaintiff.

Affiant admits that he knew that the said Harold Russell was a reporter for the "Post-Herald," but denies that he ever knew or suspected that any information given by affiant to the said Harold Russell was for the purpose of publication as a news article for said "Post-Herald," or for any other newspaper, or at all. [45]

Affiant further says that until quite recently affiant and the said Harold Russell lived in the same house and were intimate friends; that they met several times each day, and spent many of their evenings together playing dominoes; that this intimate acquaintance has continued since the removal of the said Harold Russell to his present quarters in Kau Lane.

That all interviews between affiant and the said Harold Russell have been of an informal and friendly nature; that no suggestion on the part of the said Harold Russell, and no thought on the part of affiant that the same were to be used as a basis for a newspaper article.

That the first mention made by Harold Russell to affiant regarding the above-entitled cause was about ten days ago when notice of the setting of said cause for hearing was published in the Hilo papers, when, to the said Harold Russell's remark that he noticed that said cause had been set for



trial, affiant replied: "I was careful enough to take out liability insurance."

That on the 24th instant, the date on which the newspaper article referred to in said affidavits of James W. Russell, and Harold Russell appeared in said "Daily Post-Herald" the said Harold Russell called three times on affiant at his place of business and asked affiant to go swimming with him, and that on one such occasion the said Harold Russell asked affiant if affiant expected to be called as a witness in said cause, to which question affiant replied that he did not believe so as it was admitted that the girl had fallen into the elevator shaft and that she was injured, and that affiant had not been a witness to the accident, but affiant says that he at no time referred to the attorneys for the defendant as the attorneys for the insurance company, and that he did not [46] say, except as above set forth, that there was no dispute as to the facts of the accident.

Affiant further says that he did not say to the said Harold Russell, nor to anyone else, that an insurance company was defending the said cause and/or was responsible for any verdict that might be rendered against the defendant, and affiant had not, at the time of any of his talks with the said Harold Russell, and has not now, any knowledge, information or belief upon which to base a statement that One Thousand Dollars or any other sum has been offered by any insurance company, by the defendant, or by any other person or persons, firm, association or corporation in full or in partial set-

tlement of said cause, or for any other purpose whatsoever, and/or that any such offer had been refused, and that if such a statement has been made to Harold Russell or James W. Russell it has emanated from some person other than affiant.

Affiant further says that no statement, other than hereinabove set forth, has been made by him to the said Harold Russell in reference to the above-entitled cause.

That the statements made to Harold Russell as hereinabove set forth about ten days ago, at the time of the publication of notice in the Hilo newspapers of the first setting of said cause for trial, were not published in the "Post-Herald" at that time; and no article based thereon was published by said "Post-Herald" until the afternoon of the 24th day of May, 1921, after a jury had been impaneled and sworn to try said cause and the introduction of evidence had commenced, and affiant verily believes that said publication was purposely delayed and was made on said last-named date [47] for the purpose of influencing the jury in said cause, and prejudicing the rights of the defendant therein.

(Signed) KARL J. MEINKE.

Subscribed and sworn to before me this 26th day of May, A. D. 1921.

[Seal]

Signed B. C. STEWART,  
Notary Public, Fourth Judicial Circuit, Territory  
of Hawaii.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court, Fourth Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Counter-affidavits of Karl J. Meinke and W. L. Stanley. Filed at — o'clock — M. May 26, 1921. (Sgd.) T. J. Ryan, Clerk. [48]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

**Decision and Ruling on Motion of Defendant for  
Withdrawal of Juror and Entry of Mistrial.**

In the above-entitled cause the defendant by its attorney "moves that your Honor withdraw a juror and enter a mistrial."

This is a very unusual motion, in that this Court is asked to withdraw a juror without naming any particular juror. No charge of any nature whatever is made as to the conduct, improper or otherwise, of the jury as a whole or to any juror individually.

Would it not be far beyond the authority or privilege or duty of the Court to single out a single member of that body and dismiss him when no misconduct had been charged?

The Court is of the opinion that it does not have any such authority.

The motion in question is based on the publication of a certain article as published in one of the local daily newspapers, claiming among other matters "that the said article contained false, misleading and prejudicial statements regarding the defense of said cause, and that the said newspaper and the said article therein contained has given wide circulation and has been accessible to the jurors impaneled and sworn in said cause, to the manifest and irreparable injury and prejudice of the defendant herein." [49]

This motion is based on the affidavit of one of the attorneys for the defense, namely, Judge W. L. Stanley.

It is not stated or claimed in the motion or in the affidavit that any of the jurors saw the aforesaid article; or that any of them ever read it or heard it read or ever heard that there was such an article; or that any impression of any nature whatever had been made upon the mind of any juror prejudicial or otherwise.

The Court is of the opinion that the matters complained of are too general in their nature, vague and uncertain.

The facts should be set out so that the Court may be able to judge whether or not the rights of either



the defendant or the plaintiff had been jeopardized rather than conclusions drawn by the author of the affidavit or the draughtsman of the motion.

The newspaper article itself does not purport to be a report of any trial or hearing but purports to be only news gathered from somewhere and does not bear that solemnity or that weight of authority calculated to prejudice or bias the minds of the jury that a proper charge to the jury would not remove.

It appears from the affidavits on file that the reporter who wrote the article gathered his purported information as set out in the article from the resident manager of the defendant company, and from no one else.

It further appears to the Court if any injury has been done, such injury was brought about by the operation of its own acts and it, the defendant, cannot now complain.

If the rule was otherwise no litigation could ever be terminated.

The Court does not believe the rights of anyone have [50] been jeopardized or prejudiced by the publication and circulation of the newspaper article in question.

For these reasons, and other reasons might be given, the Court is of the opinion that the Motion is not well taken, and it is hereby overruled.

May 26, 1921.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii.



[Endorsed]: L. No. 791. Dec. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. January A. D. 1921. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Damages. Decision and Ruling on Motion of Defendant for Withdrawal of Juror and Entry of Mistrial. Filed at 11:35 o'clock A. M., May 27, 1921. T. J. Ryan, Clerk. [51]

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In the Circuit Court of the Fourth Circuit, Territory of Hawaii.

January Term, 1921.

Judge J. W. THOMPSON, Presiding.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian *ad Litem*,  
Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff and assess and award damages in the sum of Seven Thousand Two Hundred Fifty Dollars (\$7250.00).

(Sgd.) T. O. MITCHELL,  
Foreman.

Dated at Hilo, Hawaii, T. H., May 27, 1921.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court, Fourth Circuit. January Term, 1921. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Verdict. Filed May 27, 1921, at 2:30 o'clock P. M. (Sgd.) Thomas Pedro, Jr., Clerk. [52]

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In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian *ad Litem*,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Judgment.**

This cause having come on regularly for trial before this Court, the Honorable J. W. Thompson, Judge of the Circuit Court of the Third Judicial Circuit, sitting by assignment in this Court, presiding, and a jury having been regularly impanelled and sworn to try said cause; and after hearing the evidence, arguments of counsel and instructions of said Court, the jury retired to consider of their verdict on the 27th day of May, 1921, and subsequently on the same day returned into court with their verdict, finding for the plaintiff in the sum

of Seven Thousand Two Hundred Fifty (\$7,250.00) Dollars, it is therefore:

ADJUDGED, that the plaintiff, Margaret Fraga, by Alfred Fraga, her guardian *ad litem*, recover of the defendant, Hoffschlaeger Company, Limited, the sum of Seven Thousand Two Hundred and Fifty (\$7,250.00) Dollars, as damages, and costs taxed at \$26.75.

Dated: Hilo, Hawaii, T. H., this 1st day of June, 1921.

(Sgd.) T. J. RYAN,  
Clerk.

O. K. as to form.

[Seal]

C. F. PARSONS,  
Of Counsel for Defendant.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Damages. Judgment, Plaintiff's Bill of Costs and Notice. Filed at 3 o'clock P. M., June 1, 1921. (Sgd.) T. J. Ryan, Clerk. [53]

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Motion for New Trial**

Now comes Hoffschlaeger Company, Limited, defendant in the above-entitled cause, and hereby moves this Honorable Court to grant a new trial of the said cause upon the following grounds:

**I.**

That the verdict of the jury rendered in said cause on the 27th day of May, 1921, in favor of the plaintiff and against the defendant for the sum of Seven Thousand Two Hundred and Fifty Dollars (\$7250) was and is contrary to the law and the evidence and the weight of the evidence.

**II.**

That the said verdict was and is excessive.

**III.**

Because of errors of law which occurred in the trial of said cause, including the following:

(a) That the Court erred in overruling the suggestion of the disqualification of the Honorable J. Wesley Thompson, Judge of the Circuit Court

of the Third Circuit, Territory of Hawaii, to preside at the trial of said cause, or to enter any order [54] therein, said suggestion having been duly made and filed by the defendant on, to wit, the 23d day of May, 1921.

(b) That the Court erred in overruling and denying the defendant's motion to withdraw a juror and to enter a mistrial of the said cause, said motion having been filed by the defendant on, to wit, the 25th day of May, 1921.

(c) That the Court erred in refusing to allow the defendant to cross-examine one V. E. M. Osorio, a witness called for the plaintiff, as to the contents of certain medical and surgical authorities, works and books of reference mentioned and referred to by the said witness as supporting his testimony in the course of his cross-examination, and in refusing to order that the said authorities, works and books of reference be produced in court so that the witness might be cross-examined thereon and the testimony in relation thereto, and in refusing to allow the defendant to cross-examine the said witness as to the contents of certain medical and surgical authorities, works and books of reference mentioned and referred to by the said witness as supporting his testimony in the course of his redirect examination.

(d) That the Court erred in refusing to grant the defendant's motion for a nonsuit.

(e) That the Court erred in the admission by the Court of evidence, oral and written, offered by



the plaintiff over the objections and exceptions of the defendant.

(f) That the Court erred in the rejection by the Court of evidence, oral and written, offered by the defendant.

(g) That the Court erred in erroneously restricting the proper cross-examination by the defendant of certain witnesses called for the plaintiff.

(h) That the Court erred in giving to the jury certain instructions requested by the plaintiff over the objections and [55] exceptions of the defendant, said instructions being plaintiff's instructions numbered 4, 5, 6, 7, 8, 10, 11 and 12.

(i) That the Court erred in the instructions given by the Court to the jury of its own motion.

#### IV.

That since the trial of the said cause the defendant has discovered new evidence which, if known to the Court prior to the rendition by the jury of its verdict in said cause, would have materially affected the Court's action in ruling on the defendant's motion to withdraw a juror and enter a mistrial of said cause, said evidence tending strongly to show that the information on which was based the article appearing on the 24th day of May, 1921, in the "Daily Post-Herald," a newspaper printed, published and circulated in the City of Hilo (a copy of which said newspaper is attached to the said motion to withdraw a juror and enter a mistrial), was obtained from one of the attorneys for the plaintiff in said cause.

## V.

That copies of the issue of said "Daily Post-Herald" printed, published and circulated as aforesaid on the 24th day of May, 1921, and containing the article relating to the said cause, last hereinabove mentioned and referred to, were on the 24th day of May, 1921, and prior to the rendition of the verdict in the said cause on the 27th day of May, 1921, easily accessible to the members of the jury impanelled and sworn to try the said cause, and that the said article was in fact seen and read by certain of said jurors.

## VI.

For gross misconduct on the part of J. W. Russell and Fred Patterson, attorneys for the plaintiff, during the trial of the said cause and particularly during the cross-examination [56] of Leo L. Sexton, a witness called for the defendant, in that while pretending to read to the said witness certain extracts from a certain surgical work, to wit, Keen's Surgery, J. W. Russell of said firm, with the knowledge of Fred Patterson, deliberately and intentionally misread the said extracts, all of which appears by an extract from the stenographer's notes of evidence taken on the trial of the said cause hereto attached and marked Exhibit —.

THIS MOTION is based on the files, papers, pleadings, exhibits, record, clerk's minutes, stenographer's notes of proceedings and evidence in said court and cause, all of which are by reference hereby made part hereof; and upon the affidavits of E. C. Compton, W. L. Stanley, C. F. Parsons and

R. T. Forrest and George K. Mills, marked Exhibits "A," "B," "C," "D" and "E," respectively.

WHEREFORE defendant prays that the verdict and judgment heretofore entered herein be vacated and set aside, and that a new trial of said cause be granted.

Dated: June 6, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

By SMITH, WARREN & STANLEY and  
(Signed) CHARLES F. PARSONS,  
Its Attorneys. [57]

**Exhibit "A."**

**Affidavit of E. C. Compton.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

E. C. Compton, being first duly sworn, on his oath, says: That he is the editor of the "Hilo Daily Tribune," a newspaper printed and published in Hilo, Hawaii, by the Hilo Tribune Publishing Company, Limited; that affiant is personally acquainted with Harold Russell, a reporter on the staff of the "Daily Post-Herald," and also with Fred Patterson, an attorney at law and a member of the firm of Russell & Patterson, Counsel for the plaintiff in the case of Margaret Fraga vs. Hoffschlaeger Company, Limited; that on the morning of Tuesday, May 24th, 1921, between the hours of 9:30 and 10 o'clock, while a jury for the trial of said case was being impanelled, affiant saw the said Harold Russell and the said Fred Patterson in close conversa-

tion together on the upper lanai of the Federal Building adjoining the Court Room; that on the afternoon of said May 24th there appeared on the front page of said "Daily Post-Herald" newspaper an article headed as follows:

**"FOURTEEN-YEAR-OLD HILO GIRL SEEKS  
\$11,500 DAMAGES FROM INSURANCE  
FIRM FOR INJURIES."**

That on the following morning, to wit, May 25th, 1921, affiant left the District Court in company with the said Harold Russell, and on the sidewalk near said District Court, the said Harold Russell informed affiant (as affiant now recalls the conversation) that the attorneys were making trouble over the publication of the said article, but that he, the said Harold Russell, was not concerned about any possible contempt proceedings as he, the said Harold Russell, had obtained the information upon which he had based said article from one of the attorneys in the case.

(Signed) E. C. COMPTON.

Subscribed and sworn to before me this 2d day of June, 1921.

[Seal]

(Signed) R. T. FORREST,

Notary Public, 4th Judicial Circuit, Territory of  
Hawaii. [58]



**Exhibit "B."**

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Affidavit of W. L. Stanley.**

City and County of Honolulu,  
Territory of Hawaii,—ss.

W. L. Stanley, being first duly sworn, upon oath  
deposes and says:

That he is a member of the firm of Smith, Warren & Stanley, the attorneys for the defendant in the above-entitled cause; that as such attorney he was present at and conducted in association with C. F. Parsons, Esq., the defense on the trial of the said cause in which the jury returned a verdict for the plaintiff on the 27th day of May, 1921; that since the trial of the said cause and on the 28th day of May, 1921, affiant discovered new and material evidence on the question of the responsibility for the publication of the article relating to the said cause and headed "Fourteen-Year-Old Hilo Girl Seeks \$11,500 Damage from Insurance Firm for Injuries," which appeared in the "Daily Post-



Herald," a newspaper printed, published, and circulated in Hilo, Hawaii, on the 24th day of May, 1921; that said evidence consisted of the statements, in reference to the publication of the [59] said article and of the source from which Howard Russell, a reporter on the said "Daily Post-Herald," obtained the information on which said article was based, contained in the affidavit of one E. C. Compton, attached to the motion for new trial filed in said cause and Marked Exhibit "A"; that affiant first learned that said E. C. Compton had the conversation with said Howard Russell in said affidavit referred to on the afternoon of May 28, 1921, at about the hour of two o'clock P. M.; that affiant, although he used due diligence, was unable during the trial of said cause to find any evidence fixing the responsibility of the publication of said article, other than appears in the affiant's affidavit and counter-affidavit attached to and made part of the defendant's motion to withdraw a juror and enter a mistrial filed in the said cause; that affiant is not acquainted with the said Howard Russell and at no time up to and including the date hereof has had any conversation with him relating to the said cause or to any other matter whatsoever; and that affiant verily believes that if the matters contained in the affidavit of said E. C. Compton above referred to had been known to the Judge presiding at the trial of said cause prior to the rendition of the verdict therein said Judge would have granted the defendant's said motion to withdraw a juror and enter a mistrial.

(Sgd.) W. L. STANLEY.

Subscribed and sworn to before me this 4th day of June, 1921.

[Seal] (Sgd.) ANNA EDMONDS,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii. [60]

**Exhibit "C."**

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Affidavit of Charles F. Parsons.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

Charles F. Parsons, being first duly sworn, upon oath deposes and says:

That he is one of the attorneys for the defendant in the above-entitled action; that he has read the article appearing on the first page of the "Daily Post-Herald" newspaper of the issue of May 24th, 1921, and the affidavits of Carl J. Meinke and W. L. Stanley in support of a motion for a mistrial, the counter-affidavit of Harold Russell with respect thereto, together with the affidavit of E. C. Compton in support of a motion for a new trial in the

above-entitled cause, in which last said affidavit the said E. C. Compton deposes that "the said Harold Russell informed affiant (as affiant now recalls the conversation) that the attorneys were making trouble over the publication of the said article, but that he, the said Harold Russell, was not concerned about any possible contempt proceedings as he, the said Harold Russell, had obtained the information upon which he had based [61] said article from one of the attorneys in the case."

Affiant further says that he at no time discussed with the said Harold Russell the said case or any of the facts therein involved and that the said Harold Russell did not obtain from affiant any information upon which said article could have been based.

(Signed) CHARLES F. PARSONS.

Subscribed and sworn to before me this 6th day of June, A. D. 1921.

[Seal]

(Signed) R. T. FORREST,

Notary Public, Fourth Judicial Circuit, Territory of Hawaii. [62]

### **Exhibit "D."**

#### **Affidavit of R. T. Forrest.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

R. T. Forrest, being first duly sworn, on his oath says: That affiant is a notary public in and for the Fourth Judicial Circuit of the Territory of Hawaii; that during the week last past E. A. Namohala, one of the jurors in the case of Mar-

garet Fraga, by her Guardian *ad Litem*, Alfred Fraga, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant, recently on trial in the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii, admitted to affiant that he, the said juror, on the afternoon of Tuesday, May 24th, 1921, saw and read in the "Daily Post-Herald" of said last-named date the article therein headed: "Fourteen-Year-Old Hilo Girl Seeks \$11,500 Damages From Insurance Firm For Injuries"; and affiant further says that, acting at the request of Charles F. Parsons, one of the attorneys for the defendant in the above-entitled action, affiant thereafter, to wit, on the 6th day of June, 1921, presented to the said E. A. Namohala an affidavit in the form hereto attached and marked Exhibit —, and that the said E. A. Namohala, after asking time to confer with his attorney, refused to subscribe or swear to said affidavit, but admitted to affiant that the statements therein made are true.

(Signed) R. T. FORREST.

Subscribed and sworn to before me this 6th day of June, A. D. 1921.

[Seal] (Signed) M. de F. SPINOLA.

Notary Public, Fourth Judicial Circuit, Territory of Hawaii. [63]



**Exhibit "D-1."**

**Affidavit of E. A. Namohala.**

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

E. A. Namohala, being first duly sworn, on his oath says:

That he was one of the jurors duly impaneled and sworn on the 24th day of May, A. D. 1921, to try the case then pending in the Circuit Court of the 4th Circuit of the Territory of Hawaii, entitled, "Margaret Fraga, by Alfred Fraga, her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant"; That on the afternoon of said last-named date, while said action was still on trial before said jury, and before the final submission of said case, there appeared in the "Daily Post-Herald" newspaper, in a prominent part of the first page thereof, an article under the following heading in display type, "Fourteen-Year-Old Hilo Girl Seeks \$11,500 Damages From Insurance Firm for Injuries"; that copies of said newspaper on the day of the publication of said article were easily accessible to the members of said jury and said article on said last-named day was seen and read by affiant.

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Subscribed and sworn to before me this — day  
of May, A. D. 1921.

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Notary Public, 4th Judicial Circuit, Territory of  
Hawaii. [64]



**Exhibit "E."****Affidavit of George K. Mills.**

Cross-examination of Witness L. L. SEXTON by  
Mr. RUSSELL.

Q. Is it not a fact that the text-books in describing methods of diagnosis of fractures of the bones, or separations of the epiphyseal, prescribe the X-Ray as one of the methods to be resorted to after certain methods have been applied?

A. No. It is one of the first things used altogether in diagnosing.

Q. You recognize Keene's work?

A. I do.

Q. I believe this your book, it belongs to your officer? A. Yes.

Q. (Mr. Russell reading from book.) Is it right that the order of examination would be first an examination of the general condition, examination for shocks, loss of blood or injury. Inspection of the injured parts, this is done before the X-Ray is taken; is that the order?

A. I don't know that there is any definite order in making examinations of that kind.

Q. If Keene says so, it would be correct, would it not? A. I suppose so.

Q. Now, Doctor, I will show you these plates, and ask you if you recognize those as being the plates taken on the 24th.

Judge STANLEY.—If the Court please, before this question is put, I would like to have the last question put to the witness. Counsel states to witness that this book Keene states that a certain

order should be followed, whereas the page he is reading from says that the order of examination can be varied according to an individual part.

Mr. PATTERSON.—No use to discuss that, it is merely [65] for the jury. The Court has ruled on that.

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

George K. Mills, being first duly sworn, on his oath says:

That he was the special stenographer sworn to take notes of the testimony and transcribe the same in the case of Margaret Fraga, by Albert Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant, recently tried in the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii; that the foregoing is a true transcript of his stenographic notes taken in said case with reference to the cross-examination of Dr. L. L. Sexton upon the book known as "Keene's Surgery."

(Signed) GEORGE K. MILLS,

Subscribed and sworn to before me this 6th day of June, A. D. 1921.

[Seal] (Signed) R. T. FORREST,  
Notary Public, Fourth Judicial Circuit, Territory of Hawaii.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger

Company, Limited, Defendant. Motion for a New Trial. Filed at 3:15 o'clock P. M. June 6, 1921. (Sgd.) T. J. Ryan, Clerk. C. F. Parsons and Smith, Warren, & Stanley, Attorneys for Defendant. [66]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Affidavit of Harold Russell.**

Territory of Hawaii,  
County of Hawaii,—ss.

Harold Russell, being first duly sworn, on oath deposes and says:

That he has read the affidavit of E. C. Compton, editor of the "Hilo Tribune" on file in this cause; that the said E. C. Compton, several days after the jury in the above-entitled cause returned a verdict in favor of the plaintiff telephoned to your affiant and asked your affiant when he would be able to see him as he wished to speak to your affiant in regard to a conversation that he, the said E. C. Compton, had had with your affiant during the progress of the Fraga's trial, and in said telephone conversa-

tion informed your affiant that the defendant's attorneys had been after him to sign an affidavit to the effect that your affiant had told him, the said E. C. Compton, that a lawyer, not giving any name, had given said Compton the information that an insurance company was the real defendant in the Fraga's suit. That in said telephone message the said Compton stated to your affiant that he, the said Compton, was not sure your affiant had made such a statement; that he vaguely recalled such a statement and that he, [67] the said Compton, was anxious to refresh his memory with your affiant before signing any affidavit. That your affiant told him over the said telephone that he had never made such a statement to him and that he then and there repeated to and reminded the said Compton that the only statement that your affiant had made in discussing the Fraga's case prior to the return of the verdict, as to the source of affiant's information was as follows:

“Personally I do not think my story in yesterday's paper was a contempt of court, and besides that I had my information from one of the defendants.”

That this statement made by your affiant was made on the morning following the publication of the said article in the “Post-Herald” in discussing the legal effect of said article. That then the said Compton repeated that he was not at all sure of the affiant's statement that an attorney had given him the information and that he did not know whether he should sign the affidavit or not, but that the de-



pendant's attorneys, namely, Judge Parson and Judge Stanley had been after him several times to get him to sign the affidavit. That this ended the telephone conversation and a few minutes later the said Compton walked into the office of the "Post-Herald," where affiant is employed, and a conversation was held between your affiant and the said Compton, in which the same matters were discussed as above set forth and all of said matters were repeated and talked over. And the said Compton further stated that the reason that he, the said Compton, thought that affiant had made to him a statement that he had received his information from an attorney was because he had seen affiant talking to an attorney the day previous to the writing of the article; and said Compton then and there in said conversation asked your affiant if he had any objection to said Compton signing an affidavit to the effect that said Compton and your affiant had engaged [68] in a conversation about the Fraga's case, and further said that he was not sure of the conversation, that your affiant replied that he could not prevent him from signing an affidavit if he so desired but that he, the said Compton, would be making a mistake if he signed an affidavit to the effect that affiant had said that an attorney had given him the information; said Compton further stated that he would rather not sign the affidavit but that if it was a newspaper fight that he, the said Compton, would quite naturally be anxious to stand by his own paper.



At said time said Compton further stated that just before the said Compton had left his own office he had seen Judge Parson and Judge Stanley approaching his office and he knew that they wanted him to sign an affidavit and that he had come out the back way of his, the said Compton's office, and came to see your affiant before meeting them.

Lastly, your affiant says that he never received the said information upon which said story was published in the "Post-Herald" from any attorney in said cause and that he never at any time made the statement to said Compton, or any one else, that he had ever at any time gotten such information from one of the attorneys in said cause.

Further your affiant sayeth not.

(Sgd.) HAROLD RUSSELL.

Subscribed and sworn to before me this 15th day of June, 1921.

[Seal]

FRED PATTERSON,  
Notary Public, Fourth Circuit, Territory of Hawaii. [69]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Affidavit of Charles Eugene Banks.**

Territory of Hawaii,  
County of Hawaii,—ss.

Charles Eugene Banks being first duly sworn, on oath deposes and says: That he is a resident of Hilo, County and Territory of Hawaii, and is employed by the Hawaii Post-Herald, Limited. That he has read the affidavit of Harold Russell, which is herewith attached, and knows the contents thereof; that he was present at the conversation held in the office of the "Daily Post-Herald" between the said Harold Russell and the said E. C. Compton, referred to in said Russell's affidavit, and heard the said conversation and that the said conversation was in substance as stated by the said Russell in his said affidavit.

Further affiant sayeth not.

(Sgd.) CHARLES EUGENE BANKS.

Subscribed and sworn to before me this 23 day of June, 1921.

[Seal] (Signed) FRED PATTERSON,  
Notary Public, Fourth Circuit, Territory of Hawaii. [70]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

**MARGARET FRAGA**, by **ALFRED FRAGA**, Her  
Guardian ad Litem,

Plaintiff,

vs.

**HOFFSCHLAEGER COMPANY, LIMITED**,  
Defendant.

**Affidavit of Frank J. Cody.**

Territory of Hawaii,  
County of Hawaii,—ss.

Frank J. Cody, being first duly sworn, on oath deposes and says: That he is a resident of Hilo, County and Territory of Hawaii, and is the managing editor of the "Daily Post-Herald," a newspaper published in said Hilo. That he has read the affidavit of Harold Russell, which is attached herewith, and knows the contents thereof; that he was present at the conversation held in the office of the "Daily Post-Herald" between the said Harold Russell and the said E. C. Compton, referred to in said Russell's affidavit, and heard the said conversation and that the said conversation was in substance as stated by the said Russell in his said affidavit.

Further affiant sayeth not.

(Signed) **FRANK J. CODY.**

Subscribed and sworn to before me this 14th day of June, 1921.

[Seal] (Signed) FRED PATTERSON,  
Notary Public, Fourth Circuit, Territory of Hawaii.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Co., Limited, Defendant. Damages. Affidavit of Harold Russell, Eugene Bank and Frank J. Cody. Filed at 3:45 o'clock P. M., Sept. 27, 1921. (Signed) Bernard H. Kelekolio, Asst. Clerk. [71]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, 1921, Term.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Ruling on Motion for New Trial.**

The defendant has included several grounds in his motion for a new trial, relying on all except VI, and presenting argument on two in particular, and which two will be considered.

The ground first presented is: "That the Court erred in overruling and denying the defendant's motion to withdraw a juror and to enter a mistrial of the said cause; said motion having been filed by the defendant on, to wit, the 25th day of May, 1921."

The motion to withdraw a juror and to enter a mistrial was based on the publication of an article in "The Daily Post-Herald" on the afternoon of the first day of the trial, which article was claimed to be false, misleading and prejudicial.

With defendant's motion for a new trial additional affidavits, and counter-affidavits, bearing on the publication of the said article, were filed. The fact that the newspaper article was read by one of the jurors is shown by the affidavit of R. T. Forrest, and this fact was not shown to the trial court at the time [72] of the decision on the motion to withdraw a juror and to enter a mistrial.

Counsel for defendant admit that during their practice in this territory they have never known of a motion of this character having been presented to a Court, and that the question has not been passed upon our Supreme Court. The fact that the Courts have not been called upon to pass on this question does not necessarily mean that the Courts are lacking in authority to entertain such a motion, or that the procedure would not be proper in this Territory. I think the motion, made at the time it was, was a proper and practical procedure to raise the question; and for a full discussion of the subject



I refer to *Usborne vs. Stephenson*, 48 L. R. A. '432, and the extensive note thereto.

The published article complained of is as follows:

**"FOURTEEN-YEAR-OLD HILO GIRL SEEKS  
\$11,500 DAMAGES FROM INSURANCE  
FIRM FOR INJURIES.**

Pretty Miss Margaret Fraga, fourteen-year-old Hilo school girl, fell down a sidewalk elevator shaft, owned by the Hoffschlaeger Company, Ltd., last August.

When her case was called in the Circuit Court this morning she asked for \$11,500 damages for injuries which she declared she suffered from her fall, from which she declares that she has never entirely recovered.

Shortly before noon, the trial jury was completed and the beginning of testimony will start when the court convene this afternoon.

**Unusual Circumstances.**

The circumstances surrounding the case are rather unusual. According to the Insurance Company, which is defending the case for the defendant, it is admitted that Miss Fraga was walking along Keawe Street and fell down the elevator shaft but they declare that the complainant did not suffer serious injuries. It is reported that the Insurance Company, at the time of the accident, agreed to settle for a small amount of damages. It is admitted that half of the iron grating, which was supposed to cover the shaft, was left unguarded.

Miss Fraga declares that her injuries, both physical and mental, were so serious that she has not

entirely recovered. The twelve men who were selected to hear the evidence in the case are as follows: James Davis, George H. Akau, John Kahiawi, Antone J. Kimi, James Kauhulapua, Charles Johnson, T. O. Mitchell, E. B. Hamauku, A. Arasuda, S. K. Maka, E. A. Namohala, and Harry Hapai. [73]

### Questions Jurisdiction.

Judge William L. Stanley and Charles F. Parsons are appearing for the Insurance Company, who are shouldering the responsibility for the Hoffschlaeger Company. It is expected that this case will require two days.

Yesterday when the case was first called, Judge W. L. Stanley filed a motion that Judge Thompson had no jurisdiction to hear this case. The motion was overruled and the case continued until this morning.

While it is obviously improper for jurors engaged in a case to read newspaper account of the progress of the trial, yet it is well settled that the mere reading of a newspaper account of a trial does not necessarily call for the granting of a new trial, if the article contained nothing of an unfair or prejudicial character and gave no intimation to the jury of the effect of any evidence, or the weight given to it by the public. If it appears, however, that the tendency of the articles read by the jury was injurious to a party the verdict should be set aside by the Court and a new trial granted. 20 R. C. L. 254, citing *Capps vs. State*, 109 Ark. 193,

159, S. W. 193, Ann. Cas. 1915C, 957 and note, 46 L. R. A. 741 and note.

Taking the above citation as a correct statement of the law, I am unable to say that the published article was of such a nature, or contained statements which were of a prejudicial character and gave effect or weight to any evidence and that the jury was in any manner influenced by the said article, even though one of the jurors read it. Particular stress by the defendant is placed on that portion of the article which states that an insurance company is defending the case for the defendant, and that the insurance company at the time of the accident agreed to settle for a small amount of damages. Newspapers should be very careful as to what they publish during a trial, and in my opinion the above statements should not have been published while the trial was going on, yet if the law permitted a new trial for everything a newspaper might publish, that is everything and anything that a party might conceive to be prejudicial, the courts would be busy granting new trials, or a statute would have to be enacted prohibiting the press from making any [74] comment whatever on proceedings in court. I cannot see where the article as published is so prejudicial as to justify, require or permit the withdrawal of a juror under the motion, or now, on that ground to grant a new trial.

The other ground of defendant's motion for a new trial is:

(C) "That the Court erred in refusing to allow defendant to cross-examine one V. E. M. Osorio,

a witness called for the plaintiff, as to the contents of certain medical and surgical authorities, works and books of reference mentioned and referred to by the said witness in supporting his testimony in the course of his cross-examination, and in refusing to order that the said authorities, works and books of reference be produced in court that the witness might be cross-examined thereon and the testimony in relation thereto, and in refusing to allow the defendant to cross-examine the said witness as to the contents of certain medical and surgical authorities, works and books of reference mentioned and referred to by the said witness as supporting his testimony in the course of his redirect examination.”

The situation is shown by the defendant's motion requesting the Court to instruct the witness to produce in court the books and authorities, to wit: “I renew my motion, stating as grounds therefor, that I wish at this time, while the witness is on the stand, to have him read the extracts from those books, which cite as authorities for his statements that the injury known as a separation of the epiphysis of the tubercle does not usually heal until the tubercle becomes bone, and is united to the shaft of the leg or tibia until from the twentieth to the twenty-fifth year.”

The books and authorities which had been referred to by Dr. Osorio on his cross-examination were Sajous, Cunningham, Rose and Carton, and De Costa. These books were not in court, [75] but were at the doctor's home or office in Hilo.



The question above raised involves only the ruling of the Court in refusing to direct the witness to produce in court the said books. There is no evidence in the record to show whether the named authorities support the Doctor or not, and it is not necessary to speculate on what the books might have shown, or what use might have been made of them had the Court ordered them produced. The witness offered to make the books available to the defendant at any time, and Senator Russell on behalf of plaintiff had it entered on the record: "that counsel may recall the witness if he wants him at any time and ask him what he wishes"; and this offer was made immediately after the Court refused to order the production of the books. If we assume that the Court had the power to order the production of the books, yet the reception of evidence is largely in the discretion of the Trial Court, and as the way has been left open by the plaintiff and the Court for defendant to examine the books, recall the witness if so desired, and make such use of the books as defendant might wish, this Court, assuming the power existed in the Trial Court, finds that there was no abuse of discretion in refusing to order the production of the said books.

Later (transcript, pages 118 and 119), Dr. Osorio on redirect was asked, "Doctor, you spoke of authorities, mentioning Sajous, Cunningham, De Costa, etc., upon the proposition that if the healing of an injury such as plaintiff has suffered would not be effected from three of five weeks, that you



cannot expect a recovery until after some years; will ask you as to whether you know that Keene is also an authority upon that." Answer: "Yes, sir." Volume II of Keene was in Court, and upon this being handed to the witness, he was then asked: "Will you see if you can find [76] anything,"—at which point the trial judge said: "Cannot do that on redirect examination." The plaintiff then concluded his redirect examination. Thereupon the defendant asked: "Q. You have stated, Doctor, that Keene's works support your statement that if healing is not effected within three or four weeks, you cannot effect a recovery for some years." "A. It was another authority I cited." "Q. You have cited Keene's works on surgery as being an authority for the proposition that if the healing of an injury, such as you say plaintiff suffered on August 20th, was not effected within three to four weeks it would not heal for years. Will you please turn to the passage in Keene to which you have reference?"

The Court on its own motion refused to permit plaintiff on redirect to go into the question of what Keene held on the subject under consideration, and counsel for defendant sought to override the Court's ruling by inquiring into the same matter. In this ruling there was no error on the part of the Court.

In concluding this part, it appears to the Court that if the works in question did not corroborate the witness, the defendant had ample opportunity at a subsequent time during the trial to have so

shown, and that not having offered to so show the defendant cannot now complain. The motion for a new trial is denied.

Hilo, Hawaii, T. H., November 16, 1921.

[Seal] (Signed) HOMER L. ROSS,  
Judge of the Circuit Court of the Fourth Judicial  
Circuit.

[Endorsed]: Original. L. No. 791. Doc. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Ruling on Motion for New Trial. Filed at 9:50 o'clock A. M., Nov. 12th, 1921. Bernard H. Kelekolio, Asst. Clerk. [77]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian *ad Litem*,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Order Overruling a Motion for New Trial.**

In the above-entitled cause the defendant's motion for a new trial having come regularly on to be heard and the motion having been argued by the

counsel for the respective parties thereto and the motion having been submitted to this Court for its decision and after being fully advised in the premises, the Court having made, entered and filed its decision in writing herein overruling and denying the said motion for a new trial and now being fully advised in the premises:

NOW, THEREFORE, it is hereby ordered and decreed that the defendant's motion for a new trial be and the same is hereby denied.

(Sgd.) HOMER L. ROSS,  
Judge, Circuit Court, 4th Judicial Circuit, Territory of Hawaii.

Dated, November 18, 1921.

Hilo, Hawaii, November 19, 1921.

Defendant excepts to the foregoing order.

(Sgd.) CHARLES F. PARSONS,  
As Counsel for Defendant.

Allowed:

(Sgd.) HOMER L. ROSS,  
Judge.

[Seal] Attest: (Sgd.) A. K. AONA,  
Clerk of said Court.

[Endorsed]: In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant. Order Overruling a Motion for New Trial. [78]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Exception to Ruling Denying Defendant's Motion  
For a New Trial.**

BE IT REMEMBERED, That heretofore, to wit, on the 27th day of May, 1921, the jury impanelled and sworn in the above-entitled cause returned a verdict therein in favor of the plaintiff and against the defendant in the sum of Seven Thousand Two Hundred and Fifty (\$7,250.00) Dollars, upon which said verdict, and in conformity therewith, judgment was entered in said cause on the 31st day of May, 1921; that thereafter, to wit, on the 6th day of June, 1921, within ten days from and after the said verdict defendant filed in due form in said court and cause, its motion for a new trial, supported by a good and sufficient bond (thereafter approved by the Judge of said Court), in the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars, conditioned for the payment of all costs of the motion in case it is not sustained, and that the moving party will not, to the detriment of the opposite party, remove or otherwise dispose of any property it may have, liable to execution; that



thereafter, to wit, on the 7th day of November, 1921, said motion for a new trial was duly presented, argued and submitted by counsel for plaintiff and defendant; that thereafter, to wit, on the 17th day of November, 1921, the Judge of said court filed in said cause a ruling denying said motion for a new trial, to which last-named ruling defendant, within the time allowed by [79] law, excepted, and does hereby except.

Dated, Hilo, Hawaii, November 17, 1921.

SMITH, WARREN & STANLEY.

By (Sgd.) CHARLES F. PARSONS.

And (Sgd.) CHARLES F. PARSONS,

As Attorneys for Hoffschlaeger Co., Ltd., Defendant and Movant.

The foregoing exception being conformable to the truth and having been duly presented to said Court for allowance on this 18th day of November, 1921, within the time provided by law, is hereby allowed.

Dated: Hilo, Hawaii, November 18th, 1921.

[Seal] (Sgd.) HOMER L. ROSS,  
Judge of Said Court.

[Endorsed]: L. No. 791. Doc. 3, pg. 213. Circuit Court, Fourth Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant. Damages. Exception to Ruling Denying Defendant's Motion for a New Trial. Filed at 8:30 o'clock A. M. November 18th, 1921. A. K. Aona, Clerk. Smith, Warren & Stan-



ley and Charles F. Parsons, Attorneys for Defendant. [80]

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In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff,

vs.

HOFFSCHLAEGER CO., LIMITED,  
Defendant.

**Plaintiff's Requested Instructions.**

The plaintiff in the above-entitled case respectfully requests the Court to give the following instructions to the jury.

Dated: Hilo, Hawaii, May —, 1921.

(Sgd.) RUSSELL & PATTERSON,  
Attorneys for Plaintiff. [81]

**INSTRUCTION NUMBER 1.**

You are instructed that you are the sole judges of the facts in this case and if you find that the defendant, Hoffschlaeger Co., Ltd., or its agents or servants were negligent in allowing the sidewalk elevator, which has been referred to in the evidence to be opened, and such negligence was the proximate cause of the accident in which the plaintiff was injured and that the plaintiff was not guilty of contributory negligence, that then it is

your duty to find for the plaintiff and against the defendant.

GIVEN.

INSTRUCTION NUMBER 2.

You are instructed that negligence is the failure to observe, for the protection of the interests of others, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby another person suffers injury.

Blashfield, 5542.

GIVEN.

INSTRUCTION NUMBER 3.

You are instructed that the negligence of the defendant's agents and employees is chargeable to their principal, the defendant, and if you find from the evidence that some person who was in the employ of the defendant and in the course of his employment acted in a negligent manner, such negligence is chargeable to the defendant.

GIVEN.

INSTRUCTION NUMBER 4.

You are also charged that it is not the law that a person passing along a sidewalk in a city, who has no knowledge of any defects therein, is required to be constantly watching for holes in, or for obstructions upon, the walk, but he has the right to assume that the walk is in a reasonably safe condition and to act upon that assumption.

GIVEN. [82]

INSTRUCTION NUMBER 5.

You are instructed that in the use of the elevator shaft in question the defendant was bound

under the law to the exercise of reasonable care and diligence for the safety of such persons as had occasion to use the sidewalk over said shaft, and it is for you to determine whether in this case the defendant used due diligence to protect the traveling public against falling into this open shaft. And upon the question as to whether defendant exercised reasonable care and prudence in this respect, you may consider the location of this shaft, whether the defendant could expect persons using the sidewalk while the shaft was open, whether or not defendant should have guarded or protected the opening so that persons passing along would not be likely to fall into it, and if so, whether defendant did so properly guard and protect said opening, and you may consider such other circumstances to be found in the evidence as will have a direct bearing upon this question.

GIVEN.

#### INSTRUCTION NUMBER 6.

You are instructed that while the plaintiff was bound to use care for her own safety in walking along the sidewalk, the care required of her was not the highest degree of care or prudence, nor was it that degree of care that an unusually cautious man or a man of extraordinary prudence would have exercised, but the degree of care expected of the plaintiff was that which an ordinarily prudent person would have exercised under similar circumstances. And in this connection you are charged that the fact merely that plaintiff's attention was

diverted at the time of the injury does not establish contributory negligence as a matter of law.

19 Am. E. An. Cas. 471.

GIVEN. [83]

#### INSTRUCTION NUMBER 7.

Upon the question as to whether or not plaintiff was guilty of contributory negligence in failing to observe the opening into which she fell, you may consider the location of this shaft, the extent to which it covered the sidewalk, whether or not the sidewalk was on a business street, whether or not she acted reasonably in diverting her attention, if her attention was diverted, her age, and such other facts to be found in the evidence bearing upon this issue, and all in the light of the fact that she had a right to assume that the sidewalk was in a reasonably safe condition.

GIVEN.

#### INSTRUCTION NUMBER 8.

You are further instructed that the mere fact that plaintiff knew of the existence of this elevator shaft and failed to avoid it or failed to look for it in passing to determine whether or not it was open at the time does not render her guilty of contributory negligence as a matter of law and will not as a matter of law preclude her from recovering.

GIVEN.

#### INSTRUCTION NUMBER 9.

You are also instructed that the plaintiff in this case has asked for the sum of \$11,500.00 damages and if you find for the plaintiff, I charge you that in



arriving at a verdict you shall assess the damages in such amount as you shall find she is entitled to under the evidence of the case and the instructions heretofore given you by the Court, but in no case shall you find for the plaintiff in excess of \$11,500.00.

GIVEN.

#### INSTRUCTION NUMBER 10.

The Court further instructs the jury that she (the plaintiff) sued for pain and suffering, which she claims to have sustained. Now, that comes under the general head of pain and suffering. There is no mathematical measure given by law [84] for this. You will ascertain from the evidence, if defendant is liable, how much pain and suffering, mentally and bodily, has been undergone by plaintiff, and how much she will undergo, if the evidence discloses it. Then you will find for her what you, as impartial jurors, would find from the evidence to be fairly compensatory to her, but in no event in a sum in excess of the amount of \$11,500.

GIVEN.

#### INSTRUCTION NUMBER 11.

You are instructed that it is the duty of a person injured through the negligence of another to use ordinary and reasonable care in securing medical or surgical aid after receiving such injury. And if you find from the evidence that a physician and surgeon was employed to treat the plaintiff after the said injury and that his instructions in



the treatment of her said injuries were followed and that the plaintiff acted with reasonable care in the treatment of her said injuries, that this is all that the law requires. The law does not impose the exercise of the best judgment in the matter, and if the judgment exercised was what an ordinary and careful person would have done under the circumstances, that is all the law requires.

GIVEN.

#### INSTRUCTION NUMBER 12.

You are further instructed that when you retire to the jury-room that you shall first arrive at a conclusion as to whether or not from the evidence and the law as given you at this time by the Court, the plaintiff is entitled to recover. If you arrive at the conclusion that the plaintiff is entitled to recover damages from the defendant then you shall give her such damages as you decide under the law and the evidence will compensate her for the injuries she received and the pain and anguish which she has suffered by reason of such injuries. [85]

GIVEN.

#### INSTRUCTION NUMBER 13.

You are further instructed that you have no right to disregard the proper arguments of counsel.

While you should not be influenced by anything but the testimony in this case, and the law as given you by the Court, still in the consideration of such evidence and the law you must consider whatever proper light may have been reflected thereon by the arguments and analysis of counsel.

WITHDRAWN.

[Endorsed]: L. No. 719. Doc. 3, pg. 213. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd., Defendant. Damages. Plaintiff's Requested Instructions. Filed at 11 o'clock A. M., May 27, 1921. (Sgd.) T. J. Ryan, Clerk. [86]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LIMITED,

Defendant.

**Defendant's Request for Instructions.**

Hoffschlaeger Co., Limited, defendant in the above-entitled action, requests that the following appended instructions be given to the jury empanelled for the trial of said action.

Dated: Hilo, Hawaii, May 26th, 1921.

(Sg.) SMITH, WARREN & STANLEY and  
CHARLES F. PARSONS,

Attorneys for Defendant. [87]

INSTRUCTION No. 3.

I instruct you, Gentlemen of the Jury, if you find from the evidence in this cause that the plain-

tiff in passing along the sidewalk in question did not exercise such care as her capacity and intelligence would enable her to use naturally and reasonably, and that such want of care on her part directly contributed to her injuries, or that if she had exercised such care the accident would not have happened, then she cannot recover in this action and your verdict must be for the defendant.

GIVEN. [88]

INSTRUCTION No. 4.

I instruct you, Gentlemen of the Jury, that the law requires of the plaintiff that she should have exercised such care and prudence in passing along the sidewalk in question as a person of like age, intelligence and capacity might be reasonably expected to naturally and ordinarily use under like circumstances, and that you cannot find for the plaintiff unless you believe from the evidence that at the time she was injured she was exercising such care and prudence; if you believe from the evidence that she was not at the time of the accident using such care and prudence your verdict must be for the defendant.

GIVEN.

INSTRUCTION No. 5.

I instruct you, Gentlemen of the Jury, that it is the duty of all persons traveling over the sidewalks of the city to use their eyes and other senses to avoid defects which are obvious or could be discovered by the exercise of ordinary care on their part, and if you believe from the evidence that the plain-

tiff by the exercising of such care as might reasonably be expected from one of like age, intelligence and capacity could have avoided falling down the defendant's elevator then your verdict must be for the defendant.

Wright vs. Kansas City, 187 Mo. 678, 86 S. W. 452.

GIVEN. [89]

#### INSTRUCTION No. 6.

I instruct you, Gentlemen of the Jury, that future consequences which are reasonably expected to follow an injury may be given in evidence for the purpose of enhancing the damages to be awarded; but to entitle such apprehended consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible are not to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.

Strohm vs. N. Y. & C. R. R. Co., 96 N. Y. 305.

GIVEN.

#### INSTRUCTION No. 7.

I instruct you, Gentlemen of the Jury, that to justify a recovery for future consequences the evi-



dence must show with reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the disability indicated may follow or will probably follow as a result of the injury will not warrant a verdict for damages.

Cordinier vs. Los Angeles Tract Co., 5 Cal.  
A 400, 91 Pac. 436.

GIVEN. [90]

INSTRUCTION No. 8.

I instruct you, Gentlemen of the Jury, that it is the duty of the person injured to lessen the damages as far as possible by the use of ordinary care and diligence, and to submit to and follow all reasonable instructions of a physician, and if you believe from the evidence that the plaintiff unreasonably refused to submit to the treatment of her physician or unreasonably refused to follow his instructions in regard to her injuries, and negligently used and walked upon her injured leg and thereby prevented and delayed recovery from her injury, and that in consequence of her refusal to follow the instructions of her physician her injury was aggravated and increased, then she cannot recover to the extent her conduct resulted in damage to her and which might have been avoided and prevented by submitting to and following the directions of her physician.

Roanoke vs. Electric Company, 68 S. E. 998.

GIVEN.

INSTRUCTION No. 9.

I instruct you, Gentlemen of the Jury, that the defendant is entitled to the legal assumption that the plaintiff was a person of ordinary intelligence



and capable of observing whatever might reasonably be apparent and therefore you have every right to believe that the plaintiff while passing along the sidewalk in question would observe that the defendant's elevator was open. I instruct you further that if it is clear from the evidence that the plaintiff would not have been injured if she had not stepped into the open shaft or if she had paid ordinary attention to what was obvious, and I further instruct you that if the plaintiff was guilty of such contributory negligence that her claim in this suit is barred thereby and that your verdict must be for the defendant.

WITHDRAWN. [91]

INSTRUCTION No. 10.

I instruct you, Gentlemen of the Jury, that before the plaintiff can recover anything in this case it is necessary for her first to show to your satisfaction by a preponderance of the evidence not only that the defendant was negligent as claimed, but also that she was herself free from any negligence which contributed to the injury. If you feel that the plaintiff has failed to show any of these things, or even if you feel that the evidence is evenly balanced, then I instruct you that your verdict must be for the defendant.

GIVEN.

INSTRUCTION No. 11.

I instruct you that in this case the defendant relies upon the defense of contributory negligence on the part of the plaintiff as well as denying that it was itself negligent. Contributory negligence is

such negligence on the part of the plaintiff herself as helped to bring about the accident and without which negligence on her part the accident would not have happened.

GIVEN.

DEFENDANT'S REQUEST FOR INSTRUCTION No. ~~13~~ 12.

The jury are instructed that where a person becomes injured through the fault of another, it is the duty of the person receiving the injury to use reasonable means or care to protect herself against any aggravation of the injury and to do all things reasonably necessary to cure said injury; and if the jury believed, from the evidence in this case, that any injury received by Margaret Fraga in falling down the elevator shaft of Hoffschlaeger Company, Limited, as averred in plaintiff's complaint, continued without improvement or without sufficient improvement, from the date thereof, because of the said Margaret's neglect thereof, because of [92] her failure to obey the reasonable instructions of her physician with respect thereto, or because of improper care thereof by her said physician, which continued injury the said Margaret Fraga could have prevented by the use of reasonable precautions and attention in caring for said injury, then, and in the event above named, the liability of the defendant must be confined to such sum in damages as would justly compensate the said Margaret Fraga for the injury received in said fall and the consequences that would naturally or probably result if

such injury had received reasonable attention and the said Margaret Fraga had used ordinary care to effect a cure thereof.

GIVEN. [93]

INSTRUCTION No. 44 (13).

I instruct you, Gentlemen of the Jury, that in case you find for the plaintiff your next duty will be to determine the amount of damages to which she is entitled. In determining the amount of damages you have a right to and should take into consideration all of the facts and circumstances as proved by the evidence, the nature and extent of the plaintiff's physical injuries and her sufferings in mind and body, if any, resulting from such physical injuries, and may find for her such sum as in your judgment, under the evidence and instructions of the Court, will be a fair and reasonable compensation for the injuries she has sustained or will sustain, if any. You are not authorized arbitrarily to enrich one party at the expense of the other nor should you act unreasonably, or through mere caprice, but should be actuated by and exercise your common sense and from a desire to do right fix such an amount as you believe will thoroughly compensate the plaintiff for the injuries received.

Davis vs. Central Railroad Company, 6 Ga. 329.

GIVEN. [94]

DEFENDANT'S REQUEST FOR INSTRUCTION No. 45 (14).

Gentlemen of the Jury: If you find for the plaintiff herein, then it would be necessary for you to assess damages against the defendant for the in-

jury which you find the plaintiff has suffered because of the negligence of the defendant without contributory negligence as herein defined on the part of the plaintiff.

In the event last above named the amount found by you should be justifiable upon some legal hypothesis presented by the evidence and should not be found solely upon an attempted compromise among yourselves.

In this connection you are instructed that a "quotient verdict," that is, a verdict founded upon an agreement in advance that each juror shall write or name a certain amount, the sum of which amounts should be divided by twelve, or any other sum, and that the quotient thus obtained shall be the amount of damages returned is illegal.

GIVEN. [95]

#### INSTRUCTION No. 15.

I instruct you, Gentlemen of the Jury, that speculative, contingent and uncertain damages are not recoverable by the plaintiff, and, if you find for the plaintiff such damages should not be considered by you in arriving at the amount of damages to be included in your verdict.

GIVEN.

[Endorsed]: Circuit Court, Fourth Judicial Circuit, Territory of Hawaii. L. No. 791, Doc. 3, pg. 213. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Co., Limited, Defendant. Damages. Defendant's Request for Instructions. Filed at 11:05 o'clock A. M. May 27, 1921. (Signed) T. J. Ryan, Clerk. Smith,



Warren & Stanley, Attorneys, Honolulu, T. H.  
[96]

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In the Circuit Court of the Fourth Circuit, Terri-  
tory of Hawaii.

January, A. D. 1921, Term.

Monday, May 23, 1921.

Present: Honorable J. W. THOMPSON, Judge,  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

Court opened by Police Officer Joseph Higgins at  
ten o'clock A. M.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

**Minutes of Court—May 23, 1921—Trial.**

J. W. Russell and Fred Patterson appearing as  
attorneys for the plaintiff.

W. L. Stanley, Esq., of the firm of Smith, War-  
ren & Stanley, appearing as attorneys for the de-  
fendant.

The Court inquires if the attorneys for the plain-  
tiff are ready.



Mr. Stanley announces to the Court that before answering he would like to make a special appearance in this cause and to suggest by way of a written suggestion which he will file later as to the disqualification of the Honorable J. W. Thompson to make any order in this case and to preside over this case. [97]

Mr. Stanley reads the said suggestion, which is as follows:

In the Circuit Court of the Fourth Circuit, Territory of Hawaii.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER CO., LIMITED,

Defendant.

SUGGESTION OF DISQUALIFICATION OF  
THE HONORABLE J. W. THOMPSON, AS  
JUDGE IN THIS CAUSE.

Comes now the defendant Hoffschlaeger Company, Limited, and specially appear herein, by its attorneys Messrs. Smith, Warren & Stanley, and suggests the disqualification of the Honorable J. W. Thompson, Judge of the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii to preside at the trial of the above-entitled cause or enter any order or judgment therein for the reasons following, to wit:

That the term of the Honorable Clement K. Quinn as Judge of the said Fourth Circuit Court expired on the 4th day of March, A. D. 1921, and since said last-named date there has been no qualified Judge of said Fourth Circuit Court.

That the request of the Chief Justice and/or the Supreme Court of the Territory of Hawaii that the said Honorable J. W. Thompson act temporarily as Judge of the Fourth Circuit Court of said Territory is illegal and not authorized by statute and the said Chief Justice and/or the Supreme Court had no jurisdiction to make said request or to authorize the said Honorable J. W. Thompson to act as said Judge.

May 23, 1921.

HOFFSCHLAEGER COMPANY, LIMITED,

By (Sgd.) SMITH, WARREN & STANLEY,

Its Attorneys. [98]

The Court overrules the suggestion.

Mr. Stanley excepts to the ruling of the Court.  
Exception allowed.

The Court inquires of Mr. Stanley if he is ready for trial and Mr. Stanley answers in the negative.

Mr. Stanley then asks that this case stand over until to-morrow morning for the reason that he is not ready, he having just arrived yesterday.

The Court announces that before it passes on the request just made, it would like to ask a question on another matter. The Court then inquires if the respective parties in the criminal case set for trial to-day are ready to proceed, and Messrs. Beers

& Desha, Jr., respectively representing the prosecution and the defendant answer in the affirmative.

Mr. Russell consents to the request made by Mr. Stanley for a continuance.

The Court grants the motion of Mr. Stanley and continues the case until to-morrow morning at the hour of nine o'clock.

Minutes of May 23, 1921.

Approved:

(Sgd.) J. W. THOMPSON,

Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [99]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, A. D. 1921, Term.

Tuesday, May 24th, 1921.

Present: Honorable J. W. THOMPSON, Judge,  
Presiding.

THOMAS PEDRO, Jr., Stenographer  
and Asst. Clerk.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

**Minutes of Court—May 24, 1921—Trial Continued).**

Messrs. Russell & Patterson appearing as attorneys for the plaintiff.

Messrs. W. L. Stanley and C. F. Parsons, appearing as attorneys for the defendant.

The Court makes a remark relative to the "Suggestion as to the disqualification of the judge now presiding" and announces that it will now file its decision on said suggestion which the court regards as a motion, which decision overrules said motion.

Mr. Stanley excepts to said decision and the exception is allowed. [100]

The Court announces that Juror Makoto Nakamoto, for several reasons, have requested that he be excused from service for to-day and to-morrow and that the reasons offered being sufficient, the Court then excused the said Makoto Nakamoto.

By order of the Court the clerk calls the roll of trial jurors and the same shows the following present:

John Kaiawe, Ernest G. Malterre, E. A. Namohala, Solomon K. Maka, E. B. Hamouku, Kitaro Ishii, George H. Akau, Antone Nobriga, Charley Johnson, Soichi Mukai, Henry Sternemann, Harry S. Hapai, James Davis, Antone R. Balbino, Samuel B. K. Haina, James Kahauolopua, Antone J. Kimi, W. W. Kuratani, T. O. Mitchell, S. R. Tsuda, and Lawrence B. Willfong.

Mr. Stanley announces that he desires to enter



the name of C. F. Parsons as associate counsel for the defendant.

There being no court reporter present, the Court suggests the name of George K. Mills, who acted as such yesterday, and asks counsel for the respective parties as to whether Mr. Mills is agreeable.

Messrs. Patterson and Parsons announce that Mr. Mills is agreeable to them, respectively.

Upon inquiry it was ascertained that Mr. Mills, owing to pressure of work, could not be procured. The Court so announces and suggests the name of J. W. Bains.

Messrs. Patterson and Parsons again announce that Mr. Bains would be agreeable to them, respectively.

Upon inquiry, it was ascertained that Mr. Bains could not be found in his office and that his whereabouts is not known. The court announces that fact.

Mr. Patterson announces that Mr. Stewart be satisfactory to them.

Mr. Patterson announces that Mr. Stewart is engaged in this case not only as stenographer but to interview witnesses as well. [101]

Mr. Patterson, in view of the statement of Mr. Parsons, objects to Mr. Stewart's acting as Court Reporter in this case.

There being no stenographers available, the court again suggests the name of Mr. Mills and orders the clerk to try and get Mr. Mills to act in this case which will take about two days. Mr.



Mills consents to act as Court Reporter in this case providing the attorneys do not talk very fast as he is not a regular court reporter.

While waiting for the arrival of Mr. Mills, the Court takes up the following case:

\* \* \* \* \*

At 9:45 o'clock Mr. George K. Mills arrives and he is immediately sworn as court reporter in this cause.

The respective parties being ready, the following trial jurors are drawn and sworn on their *voir dire*:

James Davis, Samuel B. K. Haina, Antone R. Balbino, Kitaro Ishii, George H. Akau, James Kahaulopua, E. B. Hamauku, E. A. Namohala, John Kaiawe, Charley Johnson, S. R. Tsuda, Harry S. Hapai.

Mr. Russell makes a brief outline of the case to the jurors and proceeds to examine them on their *voir dire*.

The Court announces to counsel that they must not ask any irrelevant questions as it does not feel justified in sitting and allowing questions to be answered by the jurors merely for the purpose of satisfying any private motives which counsel may have.

Mr. Russell proceeds with the examination of the jurors on their *voir dire*.

The jury is passed for cause by the plaintiff.

Mr. Parsons proceeds to examine the jurors on their *voir dire*.

The jury is passed for cause by the defendant.

## PEREMPTORY CHALLENGES.

On plaintiff's first challenge, the plaintiff peremptorily challenges Kitaro Ishii. Ernest G. Malterre is drawn and sworn on his *voir dire*. He is examined by Mr. Russell and is passed for cause by the plaintiff. Examined by Mr. Parsons and passed for cause by the defendant.

On defendant's first challenge the defendant peremptorily challenges Antone R. Balbino. T. O. Mitchell is drawn and sworn on his *voir dire*. He is examined by Mr. Russell and is passed for cause by the plaintiff. Examined by Mr. Parsons and is passed for cause by the defendant.

On plaintiff's second challenge, the plaintiff peremptorily challenges Ernest G. Malterre. Solomon K. Maka is drawn and sworn on his *voir dire*. He is examined by Mr. Russell and is passed for cause by the plaintiff. Examined by Mr. Parsons and is passed for cause by the defendant.

On defendant's second challenge the defendant peremptorily challenges Samuel B. K. Haina. W. W. Kuratani is drawn and sworn on his *voir dire*. He is examined by Mr. Russell and is passed for cause by the plaintiff. Examined by Mr. Parsons and is passed for cause by the defendant.

On plaintiff's third and last peremptory challenge, Mr. Russell announced that the jury is satisfactory to the plaintiff.

On defendant's third and last challenge the defendant peremptorily challenges W. W. Kuratani. Antone J. Kimi is drawn and sworn on his *voir dire*. He is examined by Mr. Russell and passed

for cause by the plaintiff. Examined by Mr. Parsons and passed for cause by the defendant.

Upon the Court's inquiry the respective parties announce that the jury is satisfactory. Whereupon the following trial jurors are sworn to try the case.  
[103]

James Davis, George H. Akau, John Kaiawe, Antone J. Kimi, James Kahauolopua, Charley Johnson, T. O. Mitchell, E. B. Hamauku, S. R. Tsuda, Solomon K. Maka, E. A. Namohala and Harry S. Hapai.

The remaining trial jurors are excused until Thursday morning, at ten o'clock.

At this time, to wit, 11:49 o'clock the Court continues this cause until 1:30 P. M. to-day and excuses the jurors after they have been admonished not to discuss this cause among themselves nor to allow others to discuss same within their hearing and if anyone attempts to do so, they must report that fact to the Court.

The Court takes a recess until 1:30 P. M., to-day.

#### AFTERNOON SESSION.

#### L. No. 791—DAMAGES.

MARGARET FRAGA by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

FURTHER TRIAL.

The respective parties being ready, by order of the Court, the clerk calls the roll of the jury and the same shows that all its members are present.

The further trial of the above-entitled cause proceeds.

Mr. Russell makes opening statement to the jury.

H. V. Patten called, sworn and examined as a witness for and on behalf of plaintiff.

Direct examination by Mr. Russell. Mr. Russell shows to the witness a lease by and between the First Bank of Hilo, Ltd., and [104] the defendant company, and offers the same in evidence. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "A."

No cross-examination.

Margaret Fraga, plaintiff, called, sworn and examined as a witness for and on her own behalf.

Direct examination by Mr. Russell.

It is admitted that the defendant is a corporation existing under and by virtue of the laws of the Territory of Hawaii.

Cross-examination by Mr. Stanley.

At this time, to wit, 2:50 P. M., the Court declares a recess of five minutes.

The Court reconvening, the further trial of this cause proceeds. Margaret Fraga, plaintiff, takes the stand. Cross-examination by Mr. Stanley resumes.

Redirect examination by Mr. Russell. Recross-examination by Mr. Stanley.



Alfred G. Souza called, sworn and examined as a witness for the plaintiff.

Direct examination by Mr. Russell.

With the Court's and counsel's permission, Margaret Fraga is recalled and Mr. Stanley examines her as part of his recross-examination.

Alfred G. Souza, witness for the plaintiff, recalled, to the stand.

Direct examination by Mr. Russell proceeds.

Mr. Russell shows to the witness X-ray photographic plates on which there is noted a memorandum "Margaret Fraga" and offers same in evidence. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "B." [105]

Mr. Russell offers in evidence print of plate marked Plaintiff's Exhibit "B." No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "C."

Mr. Russell offers in evidence two X-ray photographic plates which have been shown to witness. No objection.

The COURT.—They may be received in evidence and marked Plaintiff's Exhibits "D" and "E," respectively.

Mr. Russell offers in evidence print just shown to witness. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "F."

Mr. Russell offers in evidence another print just shown to witness. No objection.



The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "G."

At 3:36 P. M. Cross-examination by Mr. Stanley.

William G. Souza called, sworn and examined as a witness for the plaintiff.

Direct examination by Mr. Russell. Mr. Russell shows to the witness a photograph and offers the same in evidence. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "H."

Further direct examination by Mr. Russell proceeds.

4:08 P. M. Cross-examination by Mr. Stanley.

With the Court's and counsel's permission, Mr. Russell examines the witness again as part of his direct examination.

Mr. Stanley proceeds with the cross-examination.

4:20 P. M. Redirect examination by Mr. Russell.

4:22 P. M. The Court continues this cause until to-morrow morning at nine o'clock and excuses the jury, after giving them [106] the usual admonition with instructions to the jury that they must not visit the scene of the accident during the intermission, until that time.

Mr. Russell requests that the jury be allowed, some time during the trial, to visit the scene of the accident.

Mr. Stanley announces that there will be no objection.

The Court announces that in the event that the jury visits the scene of the accident, the Court will accompany it.

Mr. Stanley requests that Dr. Osorio have X-ray photographs taken of both knees of Margaret Fraga, defendant, and to have them finished by eight o'clock to-morrow morning.

Mr. Russell announces that there will be no objection.

4:26 P. M. Court adjourned until to-morrow morning at the hour of nine o'clock.

Minutes of May 24, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [107]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

Wednesday, May 25, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

GEORGE K. MILLS, Special Stenog-  
rapher.

Court opened by Joseph Higgins, Police Officer,  
at nine o'clock A. M.

L. No. 791.—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Minutes of Court—May 25, 1921—Trial (Continued).**

Messrs. Russell & Patterson, appearing as attorneys for plaintiff.

Messrs. Stanley & Parsons, appearing as attorneys for defendant.

By order of the Court, the clerk calls the roll of the jury in this cause and the same shows that all of its members are present.

The Court declares a recess of 15 minutes and announces that it wants to see the attorneys in this cause at its chamber.

Recess.

9:20 A. M. The Court reconvenes.

Mr. Stanley announces to the Court that he has a motion to make, a copy of which he has handed to counsel for the plaintiff in this case and that with the court's permission, he will file it later.

No objection. [108]

The COURT.—The motion may be granted.

Mr. Russell announces that the plaintiff stipulates that the motion may be deemed filed and that the plaintiff agrees as part of the motion, that the defendant file such additional stipulations or papers as it may desire.

The COURT.—The motion may be filed and made a part of the record in this case.

The clerk files the said motion.

Counsel for the respective parties announce that they are ready for argument on the motion just filed.

The Court inquires of counsel as to how long the argument on the motion will take.

Mr. Stanley, in reply to the Court, announces that it will take a couple of hours.

Counsel stipulate and agree that the argument on the motion may be made in the Judge's Chambers in the absence of the jury.

The Court announces to the jury that there has been filed a motion in this case which motion has been made a part of the record in this case and that it becomes necessary at this time for the court to hear the argument on said motion.

The Court excuses the jury until 11 o'clock this morning and also excuses Mr. Mills, the court reporter in this case, until that time.

9:27 A. M. Recess.

11:47 A. M. The court reconvenes.

The Court announces to the jury that it is almost 12 o'clock and that although there are several matters coming up at 1 o'clock it will excuse the jury until 1:30 o'clock to-day and will continue this cause until that time.

11:48 A. M. Recess to 1:15 P. M. to-day.

#### AFTERNOON SESSION.

L. No. 791. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Co., Ltd., Defendant—Damages. Further Trial. [109]

The respective parties appearing, and by order of the Court, the clerk calls the roll of the jury and the same shows that all of its members are present.



The Court announces that it is not ready to pass on the motion for reasons well known to the attorneys, and that being among others, that the Court has not yet read the citation of authorities.

Mr. Stanley announces to the court that since the last adjournment he had Dr. Osorio take X-ray plates or rather pictures of each of the legs of the plaintiff, Margaret Fraga, pursuant to agreement by counsel for the plaintiff and himself made yesterday; and that he now desires to present them to counsel for the plaintiff in the presence of the Court.

Dr. V. E. M. Osorio called, sworn and examined as a witness for the plaintiff.

Direct examination by Mr. Russell.

Mr. Russell offers in evidence an X-ray photographic plate bearing number 1014 together with print thereof. No objection.

The COURT.—It may be admitted in evidence and marked Plaintiff's Exhibit "I."

It is admitted that the plate offered is an X-ray photograph, together with the print, of the plaintiff's left leg.

Mr. Russell offers in evidence an X-ray photographic plate bearing number 1015 together with print thereof. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "J".

It is admitted that the print is a photograph of plaintiff's left leg.

Mr. Russell offers in evidence X-ray photographic plates from which were printed photo-



graphs marked Plaintiff's Exhibits "I" and "J." No objection.

The COURT.—It may be admitted in evidence and marked Plaintiff's Exhibit "K." [110]

Mr. Russell offers in evidence photographic print of X-ray plate bearing number 1016, the print being a photograph of plaintiff's right leg. No objection.

The COURT.—It may be admitted in evidence and marked Plaintiff's Exhibit "L".

Mr. Russell offers in evidence photographic print of X-ray plate bearing number 1017, the print being a photograph of plaintiff's right leg. No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "M."

Mr. Russell offers in evidence photographic plate from which were developed the prints, Plaintiff's Exhibits "L" and "M." No objection.

The COURT.—It may be received in evidence and marked Plaintiff's Exhibit "N."

It is admitted that the same were taken on the afternoon of May 24th, 1921.

Further direct examination by Mr. Russell proceeds.

With permission of Court and counsel, Mr. Stanley questions the witness.

Direct examination by Mr. Russell proceeds.

Again with permission of Court and counsel, Mr. Stanley questions the witness.

Direct examination by Mr. Russell proceeds.

Mr. Stanley having heretofore objected to the

use of a memorandum by the witness, now withdraws his objection.

Mr. Russell shows to the witness Plaintiff's Exhibits "B" and "C."

It is admitted that the photographs were taken on September 4, 1920.

Mr. Russell shows to the witness Plaintiff's Exhibits "G," "E," "D," "I," "J," "K," "L," "M," "I" and "L."

At this time, to wit, 3 P. M. the Court declares a recess of 5 minutes. [111]

The Court reconvening, Dr. V. E. M. Osorio, witness for the plaintiff, takes the stand.

Direct examination by Mr. Russell proceeds.

3:15 P. M. Cross-examination by Mr. Stanley.

4:36 P. M. Mr. Stanley, announcing to the Court that he will not be able to finish with this witness to-day, requests that this cause be continued until to-morrow morning at the hour of nine o'clock.

Mr. Russell announces that there would not be any objection to the request made by Mr. Stanley.

Whereupon the Court continues this cause until to-morrow morning at the hour of nine o'clock, and having admonished the jurors not to discuss this cause during the intermission among themselves nor allow others to discuss same withing their hearing, the Court excuses the jury until that time.

Court adjourns until to-morrow morning at the hour of nine o'clock.

Minutes of May 25, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [112]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, A. D. 1921, Term.

Thursday, May 26, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

GEORGE K. MILLS, Special Stenographer.

Court opened by Police Officer Higgins at the hour of nine o'clock A. M.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Minutes of Court—May 26, 1921—Trial (Continued).**

Messrs. Russell & Patterson, appearing as attorney for the plaintiff.

Messrs. W. L. Stanley and C. F. Parsons, appearing as attorney for the defendant.

By order of the Court, the clerk calls the roll of trial jurors sitting in the above-entitled cause and also those that have been excused heretofore until this morning at nine o'clock and the same shows the following present:

John Kaiawe, Ernest G. Malterre, E. A. Namohala, Solomon K. Maka, E. B. Hamauku, Kitaro Ishii, George H. Akau, Antone Nobriga, Charley Johnson, Soichi Mukai, Henry Sternemann, Harry S. Hapai, James Davis, Antone R. Balbino, Samuel B. K. Haina, James Kahauolopua, Antone J. Kimi, W. W. Kuritani, T. O. Mitchell, Makoto Nakamoto, S. R. Tsuda, and Lawrence B. Wilfong.

The Court announces that yesterday morning a certain motion was [113] filed in court, to wit, a motion of the defendant for withdrawal of a juror and to enter a mistrial in this cause.

The Court announces further that the Court has gone into the matter with a great deal of care and that after taking into consideration the various matters contained in the motion, the Court is of the opinion that the motion is not well taken. The Court further announces that at a time later it will



file a written opinion in order that the Court's position may be well known.

Mr. Stanley excepts to the decision of the court. Exception allowed.

Dr. V. E. M. Osorio, witness for the plaintiff, takes the stand. 9:05. Cross-examination by Mr. Stanley proceeds.

Mr. Stanley moves that the witness be instructed to produce books of medical authorities as testified to by the witness. The Court takes the matter under advisement.

The Court overrules the motion. Exception. Exception allowed.

The Court inquires of the witness if the books referred to by counsel are available.

The witness replies in the affirmative.

Mr. Stanley renews his motion. The Court again overrules the motion.

Mr. Russell announces that he is willing to note on the record that counsel may recall the witness later on, if he wants to, and that he may refer to the authorities which he has referred to.

Cross-examination by Mr. Stanley proceeds.

Mr. Stanley shows to the witness Plaintiff's Exhibits "F," "D," "G," "B" and proceeds to examine the witness further.

It is admitted that the print which Mr. Stanley now hands to the witness is in truth and in fact a similar print or copy of the print with the name number, 1015, which has been admitted in evidence in this case.



Mr. Stanley proceeds with the cross-examination of the witness.

The Court instructs the witness not to answer a certain question [114] propounded to him.

Mr. Stanley announces to the Court that on the admission of counsel he offers a duplicate of print No. 1015 which has heretofore been introduced in evidence as Plaintiff's Exhibit "J."

Mr. Russell objects to the offer as being incompetent and irrelevant.

The Court rules that this cannot be admitted. Exception. Exception allowed.

Mr. Stanley shows to the witness Plaintiff's Exhibit "J" and proceed with the examination.

10:25 A. M. Recess for five minutes by order of the Court.

The Court before leaving the bench for the recess, announces that Juror W. W. Kuritani has requested that he be excused, and that the court deeming the reasons therefor sufficient, excuses the said juror from day to day.

L. No. 791. The Court reconvening, the trial in L. No. 791 proceeds.

Dr. Osorio, witness for the plaintiff, takes the stand.

Further cross-examination by Mr. Stanley. Mr. Stanley renews his motion that the witness be instructed to procure the books of medical authorities which he has testified to, so that he may have an opportunity to cross-examine the witness.

The Court overrules the motion. Exception. Exception allowed.

The Court questions the witness. Further cross-examination by Mr. Stanley.

The Court instructs the witness not to answer a certain question, and warns Mr. Stanley that he must proceed more rapidly than he has proceeded heretofore.

Mr. Stanley excepts to the remarks of the Court. Exception allowed.

Further cross-examination by Mr. Stanley.

The Court instructs the witness again not to answer a certain question.

Mr. Stanley announces that he will refrain the question is being [115] permitted, proceeds to ask the question. The Court again instructs the witness not to answer the question.

11:24 A. M. Recess, by order of Court for five minutes, as the Court is called to the telephone.

The Court, reconvening, the trial proceeds with Dr. Osorio on the stand.

Cross-examination by Mr. Stanley proceeds.

The Court again instructs the witness not to answer the question.

Mr. Stanley objects and excepts to the action of the Court.

Exception allowed.

Further cross-examination by Mr. Stanley.

The Court again instructs the witness not to answer a certain question.

Mr. Stanley objects and excepts to the action of the Court. Exception allowed.

Mr. Stanley complains of the Court curtailing his examination.

The Court announces that the Court has not curtailed his examination nor will *the* curtail or attempt to curtail examination of counsel, but that the Court desires Counsel to inquire into material facts which are relevant to the issues in this case.

Further cross-examination by Mr. Stanley.

The Court again instructs the witness not to answer a certain question just asked.

Mr. Stanley objects to the action of the Court. Exception allowed.

The Court questions the witness.

Mr. Stanley objects to the question of the Court.

Objection overruled. Exception. Exception allowed. Further cross-examination by Mr. Stanley.

Mr. Stanley renews motion that the Court instruct the witness to procure the books referred to by him. The court again overrules the motion.

Further cross-examination by Mr. Stanley.

11:53 P. M. Redirect examination by Mr. Russell.

With permission of Court and counsel, Mr. Stanley questions the witness again as part of his examination. [116]

Redirect examination by Mr. Russell proceeds.

12:05 P. M. Recross-examination by Mr. Stanley. Mr. Stanley refers to a book labelled and known as "Keen's Surgery."

The Court objects to the reference as being a violation of the rules of evidence.

Exception. Exception allowed. Further recross-examination by Mr. Stanley.

The Court again instructs the witness not to answer the question just asked.

Exception. Exception allowed. Further re-cross-examination by Mr. Stanley.

The Court again instructs the witness not to answer the question just asked.

Exception. Exception allowed.

Mr. Stanley moves to strike out all the evidence given by Dr. Osorio to the effect that the authorities named by him supporting the proposition advanced by him on the ground that the defendant has not been allowed to cross-examine the witness on that statement and to have the books and authorities referred to by the doctor, produced to enable counsel to cross-examine.

The Court overrules the motion.

12:19 P. M. The Court continues this cause until 1:45 P. M., to-day and excuses the jury, after giving the usual admonition, until *tyat* time.

The Court takes a recess until 1:45 P. M. today.

#### AFTERNOON SESSION—1:45 P. M.

##### FURTHER TRIAL.

The respective parties being ready, by order of the Court, the clerk calls the roll of the jury and the same shows that all of the members are present.  
[117]

Daniel B. Borden called, sworn and examined as witness for the plaintiff.

1:46 P. M. Direct examination by Mr. Russell.

Mr. Stanley announces that he is willing to admit that it was about twenty seconds that elapsed



before the witness again saw the plaintiff on the day of the accident.

1:50 P. M. Cross-examination by Mr. Stanley.

At this time the Court announces to the clerk that the court sets aside its order *accusing* the jurors not engaged in this case, until to-morrow at the hour of nine o'clock.

The Court orders that the clerk inform those jurors that they are excused until Tuesday, May 31, 1921, at the hour of nine o'clock.

The clerk informs the police to so inform the said jurors.

L. No. 791. Continued.

Further cross-examination by Mr. Stanley.

Margaret Fraga, plaintiff, recalled for the purpose of making a few corrections, as part of the examination in chief.

2:10 P. M. Direct examination by Mr. Russell.

2:14 P. M. Cross-examination by Mr. Stanley.

2:18 P. M. Redirect examination by Mr. Russell. No recross-examination.

Mr. Russell offers in evidence the order of the Court appointing Alfred Fraga as guardian *ad Litem*. No objection.

The COURT.—“It may be received in evidence and marked Plaintiff’s Exhibit ‘O.’

Mr. Russell requests that the jury be permitted to visit the scene of the accident. No objection.

The Court rules that the jury visit the scene of the accident after all the evidence is in, for the reason that if the jury is permitted to go to the



said scene now, there might arise during the presentation of the defendant's case which will necessitate the jury revisiting the said scene, and thereby waste a lot of valuable time. Counsel abide by the ruling of the Court.

2:20 P. M. Plaintiff rests. [118]

Mr. Stanley moves for a nonsuit on the ground that the evidence shows that the plaintiff was guilty of contributory negligence which would bar any recovery in this case.

Mr. Stanley requests that he be allowed an opportunity to argue on the motion.

2:23 P. M. The jury is excused pending the argument on the motion for nonsuit.

In the absence of the jury the Court announces to Mr. Stanley in the presence of counsel for the plaintiff that it cannot sustain the motion.

2:25 P. M. The jury, by order of the Court returns to court.

The Court announces that the motion for a nonsuit is overruled. Exception. Exception allowed.

2:26 P. M. Recess for five minutes by order of the Court.

The Court reconvenes and the trial proceeds. Fuji Yamagita called, sworn and examined as a witness for the defendant.

Direct examination by Mr. Stanley. 2:53 P. M. Cross-examination by Mr. Russell. 2:54 P. M. Daniel B. Borden, witness for plaintiff, called as a witness for the defendant.

Direct examination by Mr. Stanley. 3:00 P. M. Cross-examination by Mr. Russell. 3:02 P. M. Dr.

L. L. Sexton called, sworn and examined as a witness for the defendant.

Direct examination by Mr. Stanley.

Mr. Stanley shows to the witness Plaintiff's Exhibits "B" and "K." 4:40 P. M. Cross-examination by Mr. Russell. The Court questions the witness. 5:20 P. M. Recess for five minutes.

The trial resuming, Dr. Sexton **takes the stand** and cross-examination by Mr. Russell proceeds. 5:35 P. M. Redirect examination by Mr. Stanley. No recross-examination.

Mr. Stanley having completed his examination of the witness, announces to the Court that he has no other witness present; that he had intended to call Dr. Irwin of Olaa, but Dr. Irwin was called to Waimea on a business trip and will not be back until eleven o'clock to-night; and that he is his last witness. [119]

Mr. Stanley requests that this matter be continued until to-morrow morning at nine o'clock, so that he may be able to call Dr. Irwin.

Mr. Russell announces that the plaintiff would like to go on with the case and finish it to-night as Mr. Patterson will leave by the Mauna Kea for Honolulu to-morrow to appear in the Supreme Court on Saturday morning at ten o'clock.

Mr. Stanley in reply to the question of the Court as to what Dr. Irwin will testify, announces that he would testify as Dr. Sexton has testified.

Mr. Stanley asks if counsel for the plaintiff will admit that Dr. Irwin, if he were called, would testify the same as Dr. Sexton has testified. He

asked that the plaintiff's counsel so admits, he will be ready to go on at any time the Court mentions.

The Court proceeds to excuse the jury until to-morrow morning, but before the order is complete, Mr. Russell announces that the plaintiff will admit, if the Court is disposed to granting a continuance until to-morrow morning, that Dr. Irwin would testify, if called, the same as Dr. Sexton has testified to.

The Court does not accept the statement of Mr. Russell.

Mr. Russell then announces that they will admit that if Dr. Irwin would be called, he would testify the same as Dr. Sexton has been testifying.

Mr. Stanley announces that with that the defendant rests.

The Court inquires whether counsel have their instructions ready.

Mr. Russell announces that the plaintiff's instructions are ready.

Mr. Stanley announces that the defendant's instructions are partly ready.

Mr. Stanley then asks the Court to continue this cause until 7:30 o'clock this evening so that by that time he will have all of his instructions ready.  
[120]

The Court grants the request and continues this cause until 7:30 o'clock this evening, and the jury is excused until that time.

5:48 P. M. Recess until 7:30 P. M.

EVENING SESSION—7:30 o'clock.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

### FURTHER TRIAL.

The respective parties being ready, by order of the Court, the clerk calls the roll of the jury and the same shows that all of its members are present.

Mr. Russell requests that the jury now visit the premises where the accident occurred.

No objection by the defendant.

The COURT.—“Gentlemen, there being no objection to it, I believe I shall allow that. I do that with a great deal of hesitation, however. I want to state that no person is allowed or privileged to point out to the jurors any particular features or any particular, except to say, ‘Here is the place for you to examine.’ The attorneys, witnesses and the Court are included in that order.”

Mr. Russell asks the Court if the Court will accompany the jury.

The Court replies in the affirmative.

The Court instructs the jury that while at the scene of the accident, that the jurors do not point out to each other anything because that will be evi-



dence without coming to you under oath; [121] and that they should not permit anyone to tell them anything.

The Court announces that it desires to modify the order heretofore made in order that a stipulation with regard to the condition of the premises to be viewed may be included, if counsel will so stipulate and agree.

Counsel stipulate that the premises to be viewed are practically in the same condition now as they were when the accident happened.

The Court orders that with that stipulation, the jury may go and view the premises.

7:45 P. M. The jury, accompanied by the Court, clerk, bailiff, and Mr. Patterson proceed to view the premises, returning to court at 7:50 P. M.

At this time the jury is excused pending the settlement of instructions by counsel.

8:48 P. M. The jury is called into court and the roll-call of the jury is waived by counsel.

Counsel for the respective parties agree that argument be limited to  $\frac{3}{4}$  hour to each side.

The Court announces its opinion to be that it will be advisable to conclude the argument to-night and charge the jury to-morrow as it will be too late to charge the jury to-night.

Counsel for the respective parties agree with the Court.

8:50 P. M. Mr. Patterson argues to the jury and ends his argument at 9:22 P. M.

9:23 P. M. Mr. Stanley argues to the jury and ends his argument at 10:08 P. M.



At this time the Court declares a recess of five minutes.

The Court reconvening the jury returns to court.

10:16 P. M. Mr. Russell argues to the jury and closes the argument at 10:47 P. M.

The argument having been concluded, the Court announces that it will not deliver a charge to the jury until to-morrow morning.

The Court admonishes the jury again not to discuss this case among themselves nor with others nor allow others to discuss same in their hearing. The Court instructs the jurors to have their [122] minds free until after the Court has charged them and they have retired to deliberate upon their verdict.

The Court continues this cause until to-morrow morning at ten o'clock and excuses the jury until that time.

10:48 P. M. The Court adjourns until to-morrow morning at the hour of ten o'clock.

Minutes of May 26th, 1921.

Approved.

(Sgd.) J. W. THOMPSON,

Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [123]

In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

Friday, May 27th, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

GEORGE K. MILLS (Stenographer Special).

Court opened by Police Officer Joseph Higgins at  
10 o'clock A. M.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Minutes of Court—May 27, 1921—Trial (Continued).**

J. W. Russell, Esq., appearing as attorney for the  
plaintiff.

W. L. Stanley, Esq., appearing as attorney for the  
defendant.

By order of the Court the clerk calls the roll of  
the jury and the same shows that all of its members  
are present.

The Court charges the jury.

The Court having completed its charge to the jury, Juror George H. Akau asks for defendant's request for instruction No. 14. No objection.

The Court again reads the defendant's request for instruction No. 14.

Mr. Stanley, on behalf of the defendant, excepts to the following instructions requested and allowed and given by the Court, to wit, Numbers 4, 5, 6, 7, 8, 10, 11, and 12, and also to a certain portion of the Court's oral instruction.

The COURT.—“Let the exception be noted.”  
[124]

Mr. Russell, on behalf of the plaintiff, excepts to the Court's giving of defendant's request for instructions Nos. 7 and 12.

The COURT.—“Let the exception be noted.”

Joseph Higgins is sworn specially to take charge of the jury, as bailiff.

10:40 A. M. The jury retires in charge of the above-named specially sworn bailiff.

At this time the Court declares a recess.

12:19 P. M. The jury, by order of the Court, returns to court.

The Court announces that inasmuch as the jury has not announced that they have reached it a verdict, it is presumed that they have not; and it now being time for lunch, the Court will take a recess, during which time they will have lunch. The Court orders the jury to proceed to Hilo Hotel for lunch and to return after their lunch to their room for further deliberation.

The Court further announces that it has been informed that it has been the custom in this court that the assistant clerk is specially sworn in together with the bailiff to take charge of the jury while proceeding to, at, and returning from lunch to the court.

The Court inquires of counsel for the respective parties if *their* is any objection, and they reply in the negative.

Whereupon Thomas Pedro, Jr., and Joseph Higgins are specially sworn as bailiffs to take charge of the jury as above indicated.

12:23 P. M. The jury in charge of the above-named bailiffs proceed to the Hilo Hotel for lunch.

1:20 P. M. The jury in charge of the above-named bailiffs return to the court and the jury retire to their room.

2:10 P. M. The jury returns to the court and in answer to the Court's query as to whether they have reached a verdict, announced: "Yes, your Honor."

The verdict, by order of the Court, is read in open court and is as follows: "We, the jury in the above-entitled cause, find for the plaintiff and assesses and award damages in the sum of Seven Thousand Two Hundred Fifty Dollars (\$7,250.00)."

(Sgd.) T. O. MITCHELL,

Foreman. [125]

Mr. Stanley, on behalf of the defendant, excepts to the above verdict on the ground that it is contrary to the law and the evidence and the weight of the evidence and on the ground that the damages

awarded thereby are excessive. Mr. Stanley gives notice of a motion for a new trial.

The COURT.—“Let the exception and notice be noted.”

Mr. Russell, on behalf of the plaintiff, thanks the jury.

The Court announces to the jurors that their services, owing to the fact that the Court has to go to its own circuit to conduct some business, and to the further fact that Monday next is a legal holiday, will not be needed until Tuesday morning.

The jurors are therefore excused until Tuesday, May 31, 1921, at the hour of nine o'clock.

Mr. Stanley requests that the Court order the stenographer to transcribe the proceedings of the case just finished.

The Court announces that if the order is made the payment for the transcript will be paid by the party ordering same, and not by the Court.

Mr. Stanley entirely agrees with the Court, and asks that at the final termination of the case, the costs for the transcript will be included in the cost bill, to be paid by the losing party. The Court grants the request.

Mr. Stanley further requests that the court make an order giving the defendant thirty (30) days from and after the delivery of the transcript, within which to file its bill of exceptions. Mr. Russell announces that there is no objection.

The COURT.—“The request is granted and the defendant may have thirty (30) days after the receipt of the transcript from the stenographer.”



2:40 P. M. Court adjourns until Tuesday, May 31, 1921, at the hour of nine o'clock.

Minutes of May 27, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, T. H. [126]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

Wednesday, June 1st, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

Court opened by Police Officer Joseph Higgins at  
nine o'clock.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Minutes of Court—June 1, 1921—Judgment and  
Cost Bill.**

J. W. Russell, Esq., appearing as attorney for the  
plaintiff, presents the judgment and the cost bill.

The COURT.—“Mr. Clerk, in the case of Margaret Fraga by Alfred Fraga, her guardian *ad Litem*, plaintiff, against Hoffschlaeger Company, Ltd., defendant, you may enter a judgment in the sum of \$7,250.00 as damages. Then you may ascertain the amount of the court costs and enter in the blank here on the document, marked plaintiff's bill of costs, and also the total.”

Recess.

Minutes of June 1st, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the 4th Circuit Court, T. H. [127]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

Wednesday, June 22, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

**Minutes of Court—June 22, 1921—Trial (Continued).**

Court opened at ten o'clock A. M., by Police Officer Joseph Higgins.

Mr. Patterson announces to the Court that he desires to take up the motion for a new trial in the case of Fraga vs. Hoffschlaeger Co., some time to-

morrow morning and that he had spoken to Judge Parsons about it.

The Court sets this matter down for disposition to-morrow morning at nine o'clock.

Minutes of June 22, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [128]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January Term, A. D. 1921.

Thursday, June 23, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

Court opened at ten o'clock by Police Officer  
Joseph Higgins.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,  
Defendant.

**Minutes of Court—June 23, 1921—Motion for a New  
Trial.**

F. Patterson, Esq., appearing as attorney for the  
plaintiff.

C. F. Parsons, Esq., appearing as attorney for the defendant.

By consent of counsel this matter is continued until to-morrow morning at nine o'clock. [129]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, A. D. 1921, Term.

Friday, June 24, 1921.

Present: Honorable J. W. THOMPSON, Judge  
Presiding.

THOMAS PEDRO, Jr., Asst. Clerk and  
Stenographer.

L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

**Minutes of Court—June 24, 1921—Trial Con-  
tinued).**

**MOTION FOR A NEW TRIAL.**

C. F. Parsons, Esq., appearing as attorney for the defendant-movant.

J. W. Russell, Esq., appearing as attorney for the plaintiff.

Mr. Parsons announces to the Court that before the motion for a new trial is argued, Judge Stanley would like to have the transcript of evidence and go over the same; that the transcript is not yet finished.

By consent of counsel this matter is continued until moved on.

Minutes of June 24th, 1921.

Approved.

(Sgd.) J. W. THOMPSON,  
Acting Judge of the Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii. [130]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, A. D. 1921, Term.

Wednesday, November 2, 1921.

The Court convened at 10 o'clock A. M.

Present: Honorable HOMER L. ROSS, Judge  
Presiding.

BERNARD H. KELEKOLIO, Assistant  
Clerk.

P. MAURICE McMAHON, Reporter.

LAW CASE No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.



**Minutes of Court—November 2, 1921—Trial (Continued).**

**MOTION FOR A NEW TRIAL.**

Present: J. W. Russell of the firm of Russell & Patterson, appearing for the plaintiff.

C. F. Parsons, appearing for the defendant.

This cause having come up on a motion for a new trial, Mr. Russell stated in open court that he has arrived at some understanding with Mr. Parsons and that they have agreed to set this case for hearing on the motion for a new trial for the 7th day of November, 1921, whereupon the Court ordered that this case may be set down for hearing on the motion for a new trial on the 7th day of November.

By the Court:

(Sgd.) BERNARD H. KELEKOLIOO,

Assistant Clerk. [131]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

January, A. D. 1921, Term.

Monday, November 7, 1921.

The Court convened at 10 o'clock.

Present: Honorable HOMER L. ROSS, Judge  
Presiding.

BERNARD H. KELEKOLIO, Assistant  
Clerk.

P. MAURICE McMAHON, Reporter.

WILLIAM K. ELLIS, Bailiff.

## L. No. 791—DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LTD.,

Defendant.

**Minutes of Court—November 7, 1921—Trial (Continued).**

HEARING: MOTION FOR A NEW TRIAL.

Present: Russell & Patterson, appearing for the plaintiff.

C. F. Parsons and Stanley, appearing for defendant.

This cause coming on to be heard on the motion of the defendant for a new trial and both attorneys being present, Mr. Stanley proceeded to present his argument to the court in support of the motion for a new trial.

Mr. Stanley reads the "Daily Post-Herald" of May 24, 1921, in open court regarding the damage suit of Miss Fraga vs. The Hoffschlaeger Company, Ltd. Mr. Stanley also quotes authorities in support of his contention where the Court erred, at the same time handing copy of said authorities to the Court and Mr. Russell, for the plaintiff.

At 11:30 A. M. Mr. Stanley hands to the Court a skeleton brief at the same time handing Mr. Russell a copy. [132]

Mr. Russell at this time asked the Court that he be allowed to answer the argument of Mr. Stanley, as he is to leave for Honolulu, whereupon the Court allowed him to do so, with the permission of counsel, however.

At 11:35 o'clock A. M., the Court took a recess.

At 11:45 o'clock A. M. the Court reconvened and Mr. Russell proceeded to present his argument to the court in reply to that of Mr. Stanley.

At 12:30 o'clock P. M., Mr. Russell having concluded his argument before the Court, and the Court having ordered a recess to be taken, Mr. Edmondson, appearing in court, asked that he be allowed to present some matters before a recess is taken, whereupon the Court allowed him to present such matters as he desired.

#### AFTERNOON SESSION

At 1:35 o'clock P. M., the Court having reconvened, Mr. Stanley proceeded to again present his argument to the Court from the point where he rested when Mr. Russell made his argument.

Mr. Stanley also stated to the Court that all the assignments of errors are relied on with the exception of that part relating to the misconduct on the part of Russell & Patterson.

At 2:00 o'clock P. M., Mr. Patterson presents his argument to the Court in reply to that of Mr. Stanley and moves the Court that the motion for a new trial be denied.

Mr. Patterson having concluded his argument, Mr. Stanley asked that he would like to have it appear in the minutes that no copies of the counter-

affidavits were ever served on either counsel for the defendants in this case, and the further fact these affidavits were signed on June 15, 1921, and were not filed until three months later September 27, 1921.

Mr. Stanley again presents his argument to the Court and [133] having concluded his argument the Court stated as follows:

The COURT.—I will give this case careful consideration. Whatever conclusions I come to about it I will let you know. That is the best I can do.

At 3:05 o'clock P. M., there being no further business, the Court adjourned until to-morrow morning at ten o'clock.

By the Court:

(Sgd.) BERNARD H. KELEKOLIO,  
Assistant Clerk. [134]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

**DAMAGES.**

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.

**Transcript of Evidence.**

RUSSELL & PATTERSON, attorneys for Plaintiff.

SMITH, WARREN & STANLEY and CHARLES  
F. PARSONS, Attorneys for Defendant.

J. W. THOMPSON, Esquire, Judge Presiding.  
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**Testimony of H. V. Patten, for Plaintiff.**

Swearing of witness by Clerk of the Court:

Q. What is your name? A. H. V. Patten.

(Examination of witness by Mr. RUSSELL.)

Q. You are the cashier of the First Bank of Hilo? A. Yes.

Q. As cashier you are a member of the Board of Directors, are you not? A. Yes.

Q. I will show you an instrument described as a lease executed on the 21st day of October, 1919, between the First Bank of Hilo and Hoffschlaeger Co., Ltd., and ask you if the signature is that of the First Bank of Hilo?

A. (Examination of instrument by witness:) Yes, it is.

Q. That is, this lease was executed between you and Hoffschlaeger Co., Ltd.? A. Yes.

Q. They are occupying the premises referred to under this lease? A. Yes.

Q. The premises described in this lease are the store premises in the building known as the Old First Bank of Hilo building? A. Yes.

Q. And Hoffschlaeger Company occupy no other premises in that building than the premises described in this lease? A. No.

Q. They do not occupy any other part? A. No.

Q. The elevator referred to in this lease—

Judge STANLEY.—Objected to as (here lease was handed by Mr. Russell to Judge Stanley.)

(Testimony of H. V. Patten.)

Judge STANLEY.—No objection to lease.

Judge THOMPSON.—There being no objection to this document being admitted in evidence, it is so ordered and marked Plaintiff's Exhibit "A."

(Continuation of Examination by Mr. RUSSELL.)

Q. I will ask you if the elevator referred to in this lease is the elevator in front of the store that they occupy?

A. I do not know what elevator you refer to.

Mr. RUSSELL.—I will show you the lease.

A. Why I don't know whether I like to go into this thing without referring, conferring with my attorney.

Q. The question is whether the elevator in this lease is the elevator in front of Hoffschlaeger's store?

A. The elevator referred to is the one in front of Hoffschlaeger's store.

That is all.

Judge STANLEY.— No questions. We will at this time admit that the defendant is a corporation.

**Testimony of Margaret Fraga, in Her Own Behalf.**

Swearing of witness by Clerk of the Court:

Q. What is your name? A. Margaret Fraga.

(Examination of Witness by Mr. RUSSELL.)

Q. You are the plaintiff in this case? A. Yes.

Q. And this gentleman here (indicating) is your father? A. Yes.

Q. How old are you?

(Testimony of Margaret Fraga.)

A. I am thirteen, I will be fourteen on October 29th. [141—2]

Q. You live with your parents, your father and mother? A. Yes.

Q. And in Hilo? A. Yes.

Q. At the Waiakea Homesteads? A. Yes.

Q. Do you remember an accident that happened to you on the 20th of August 1920? A. Yes.

Q. Before the accident where had you been?

A. I had just come from Holmes' Store on an errand for Mrs. Cabrinha.

Q. Which way were you going?

A. I was going back.

Q. Homes' Store is on Waianuenue Street, is it not? A. Yes.

Q. You know that is Waianuenue Street?

A. Yes.

Q. Through what street were you proceeding to Cabrinha's Store?

A. On the street that Hoffschlaeger's Store is on.

Q. Do you remember that is known as Keawe Street now? A. Yes.

Q. It used to be Bridge Street? A. Yes.

Q. Do you know the name of the building that the store of Hoffschlaeger Company to which you referred is called; the name under which it was known? A. I do not know.

Q. Do you know that it is the old Bank Building? A. Yes. [142—3]

Q. And on what street is Cabrinha's store?



(Testimony of Margaret Fraga.)

A. It is on the same street as Hoffschlaeger Company.

Q. And it is on the Puueo side of Hoffschlaeger's store?    A. Yes.

Q. And Homes' Store is on the Waiakea side?  
A. Yes.

Q. So that in going from Homes' Store to Ca-brinha's Store, the nearest path would lead, nearest path would lead you past Hoffschlaeger's Store, in the Old Bank Building?    A. Yes.

Q. Now, as you approached the store of Hoffschlaeger & Company, were you walking slowly or fast?    A. I was walking slowly.

Q. Did you have anything in your arms?

A. I had two packages.

Q. Large or small?    A. Small ones.

Q. What did they contain?

A. One twenty-five cents worth of lemons, and the other yellow cornmeal.

Q. You say you were walking slow?    A. Yes.

Q. What time was it?    A. About three o'clock.

Q. In the afternoon?    A. Yes.

Q. Will you tell what happened then as you were approaching the store of Hoffschlaeger & Company? [143—4]

A. Just as I was getting there I heard a call across the street and as I looked I went down.

Q. Do you know who called you?

A. It was Dan Borden, because when I was at the corner, I saw this boy coming.

(Testimony of Margaret Fraga.)

Q. How long after you looked over was it that you fell; about how many steps had you taken?

A. I think about one step. I went down right away.

Q. Had you walked past over the sidewalk before?     A. Yes.

Q. Did you ever fall in any hole?     A. No.

Q. You had never stepped in any hole before?

A. No.

Q. Had you ever met with any accident on that sidewalk before then? Had you stumbled at any time?     A. No.

Q. How often had you passed this place?

A. Before I got hurt I used to go past every day.

Q. You are related to Mr. Cabrinha?

A. Yes.

Q. And you used to go there frequently?

A. Yes.

Q. Now, after you fell in this hole what happened?

A. I do not remember anything, I felt kind of dizzy.

Q. You remember being carried up?

A. When I was about the top I remember somebody taking me home. [144—5]

Q. You say about the top?

A. The elevator was near the sidewalk.

Q. You were taken up on the elevator?

A. Yes.

Q. And from the elevator you were taken into the store?

(Testimony of Margaret Fraga.)

A. Yes. Because I asked them to do so. Cabrinha's store.

Q. You were taken into Hoffschlaeger's store?

A. No.

Q. You asked to be taken to your mother's at Cabrinha's? A. Yes.

Q. Then what happened?

A. Before this they wanted to send me to my mother at Cabrinha's in a machine.

Q. How long were you at Cabrinha's?

A. We got there the man took me to a doctor.

Q. What doctor. A. Osorio.

Q. And from there what happened to you? What happened to you?

A. I went home; some one took me home; a man took me home in a machine.

Q. Will you state whether or not when you first realized that you were being carried, you suffered any pain?

Judge STANLEY.—Objection; rather leading. The witness is—

Mr. RUSSELL.—I will withdraw the question.

Q. Will you describe your condition with reference to pains?

A. At first my right leg, my right knee pained me, and my both arms were scratched and my both feet, but I did [145—6] not know my back was scratched and my left leg scratched.

Q. Any other parts of the body?

A. There was a hole in my right eye.

(Testimony of Margaret Fraga.)

(Examination by jury of the scar of alleged hole in right eye.)

Q. Is that hole which you refer to at the place that you have the scar now?     A. Yes.

Q. Did you have any scars before this accident?  
A. No.

Q. Was it bleeding at the time?     A. Yes.

Q. These pains which you refer to you felt as you were being taken out of Hoffschlaeger & Company?  
A. Yes.

Q. State how long those pains continued.

A. They continued till I got home; mama put on a hot-water bag. Some *othe* of them have healed, others not.

Q. After you got home what did you do?

A. I went to bed.

Q. How long did you remain in bed?

A. Three weeks steady till I went to school.

Q. Will you state whether or not you suffered any pains during that time?     A. Yes.

Q. Will you tell the jury as to how you suffered pains and whether or not it was continuous or merely at times? How long did you suffer? Did you suffer pain at the time?     A. Yes? [146—7]

Q. You said some parts of your body had healed. How long after the accident, did those parts begin to heal?

A. The scratches went away about two weeks after that.

Q. What scratches?

(Testimony of Margaret Fraga.)

A. I got scratched on the arms and back and hip.

Q. And how about the eye?

A. The eye was bleeding and there was a deep hole and the doctor had to put cotton in it.

Q. How long before that healed?

A. It healed about a month.

Q. And about your leg after you got out of bed; will you describe the condition of your leg?

A. The doctor put some plaster on it; I do not know.

Q. State how you felt with reference to the leg?

A. It began to swell up; I could hardly walk.

Q. Before the accident had you any pains in either leg?     A. No.

Q. You say that it would swell up. Just how would it swell up and how often would it swell up?

A. It used to swell up down here (indicating the calf and the ankle).

Q. And this would occur how often?

A. Nearly every day the leg used to hurt me.

Q. How about now? Do you feel any pains?

A. Yes, once in a while. It does not hurt me now as I have a rubber band on it.

Q. It is around your knee now?     A. Yes. [147—8]

Q. Are you able to walk comfortably now?

A. No.

Q. How does walking affect you?

A. Every time I walk it seems that the bones are going back and forth.

Q. Is it painful?     A. Yes.



(Testimony of Margaret Fraga.)

Q. How much walking do you do?

A. I walk around the house, that is all.

Q. Do you go to school?      A. Yes.

Q. How do you go to school?

A. Papa's uncle takes me to school and a Hawaiian woman brings me back from school.

Q. How long have you lived out there at the homestead?

A. About three years in June before the accident.

Q. Before the accident, how would you go to school?

A. I used to walk to the Waiakea Depot and take the train from there to Hilo Station and from there I walked to school.

Q. And do your brothers and sisters go to school?

A. They do the same now as I used to do before. They take the train.

Q. Do you do any playing?      A. No.

Q. You testified that immediately after the accident that you were taken to Doctor Osorio's office?      A. Yes.

Q. And he attended you since?      A. Yes.

Q. Have you had any other doctor?      A. No.

[148—9]

Q. How often would he come to see you?

A. At first at my house every other day, now I go to his office twice a week, but the last two weeks I have not been there.

Q. You spoke of the swelling of your leg after you got out of bed, will you state whether or not

(Testimony of Margaret Fraga.)

there is any condition of swelling suffered by you now? Does it swell up now?

A. It is swollen to-day.

Q. How often has that occurred lately?

A. Well, it gets swollen every day. I do not know what the matter is.

Q. And do I understand you to mean that it swells up and goes down? A. Yes.

Q. How about when you go to bed at nights, you feel any pain?

A. No, because I take the rubber band off my knee and lay still.

Q. Do you remember going to Dr. Sexton's office sometime ago? A. Yes.

Q. How many times did you go there?

A. Well, I went there to take X-rays of my feet.

Q. How many times?

A. I don't quite remember.

Q. Every time you went there it was for the purpose of having X-rays taken? A. Yes.

Q. Who sent you there? A. Dr. Osorio.

Q. He went with you? [149—10]

A. Once he went with me the other times he sent me there.

Q. And you had photographs taken of your leg?

A. Yes.

Q. Who did it? A. Alfred Souza.

Q. He is the young man employed in the office of Sexton and Heck? A. Yes.

Q. You spoke of the hole in your eye. Do you

(Testimony of Margaret Fraga.)

remember as to whether there were any other injuries about your head?

A. My head was kind of swollen.

Q. Where? A. In back.

Q. Now, just before you fell in this hole and while you were looking at young Borden, did you and he exchange any remarks? Did you speak to Borden? A. No.

Q. Did you hear him remark, "Here comes another duchy"? A. Yes.

Q. He had reference to the dutch cut of your hair? A. Yes.

Q. Did you recall whether anything else was said by him? A. No.

Q. Did you hear anybody say anything to you?

A. Before I went down, no.

Q. Did you see anybody on the side that you were walking on? A. No. [150—11]

Q. Do you remember whether or not anyone grabbed you as you were falling? A. No.

Q. No one grabbed you? A. No.

Q. Have you seen this place since then?

A. Well, I pass there.

Q. You do not know how deep it is? A. No.

Cross-examination of Witness MARGARET FRAGA by Judge STANLEY.

Q. Tell me, Margaret,—you do not mind me calling you Margaret—what time of the day was it that you fell into this elevator?

A. It was about three o'clock in the afternoon.

(Testimony of Margaret Fraga.)

Q. And you were walking from Homes' Store on Waianuenue Street passed Hoffschlaeger's Store on your way to Cabrinha's store? A. Yes.

Q. Mrs. Cabrinha is your aunt? A. Yes.

Q. You say that you saw a boy named Borden on the other side of the street? A. Yes.

Q. And he called out, "Here comes another duchy," and then you say you took about one step and fell into the elevator? That is right?

A. Yes.

Q. So at that time were right on top of the elevator and almost in the hole? A. Yes. [151—12]

Q. Before you heard him call out, "Here comes another duchy," where were you looking?

A. I was looking where I was walking.

Q. That is, looking, going carefully along the street? A. Yes.

Q. And you were doing, that is you were looking where you were going; looking at the sidewalk when you heard the remark, "Here comes another duchy"? A. Yes.

Q. And then you lifted your foot and fell in?

A. I looked across the street and took a step and fell into the hole.

Q. Now, you know what the hole in the sidewalk is for? A. Yes.

Q. What is it for?

A. For loading freight.

Q. You know there is an elevator down there, down that hole and on that elevator is placed



(Testimony of Margaret Fraga.)

freight, and it is brought flush with the street and goods are put on the sidewalk or taken immediately from the elevator on to trucks and taken away?

A. Yes.

Q. How long have you lived in Hilo, Margaret?

A. I do not quite remember.

Q. How old were you when you came here first?

A. I do not know.

Q. You were born in Hilo?      A. No.

Q. Where do you go to school now?

A. Hilo Union School. [152—13]

Q. How long have you been going to school there?

A. Two years.

Q. And before that time were you going to school in Hilo?      A. Yes.

Q. Where was that?      A. Sister's school.

Q. How long were you there? About how long?

A. I went there,—I was there about four years.

Q. And this aunt of yours is married to a Mr. Cabrinha, whose store is on Keawe Street just beyond Hoffschlaeger's?

A. Yes.

Q. Is there a garage next to Hoffschlaeger's, on the Puueo side and then a street runs down towards the sea and then Cabrinha's on the opposite side of that street?      A. Yes.

Q. What is the name of that street running down between Cabrinha's and the garage?

A. I have forgotten the name.

Q. Shipman Street, is it not?

A. I do not know.



(Testimony of Margaret Fraga.)

Q. How long have you known of this freight elevator that was in front of Hoffschlaeger's store?

A. Well, since I have been living at Puueo.

Q. And how long was that, since your were going to the Sister's school?

A. About three years.

Q. You have been living at Puueo at least three years?

A. I stayed there with my aunt then I went down to the houselots. [153—14]

Q. You were staying with your aunt, Mrs. Cabrinha, and went to the Sister's school, and after that went to live at the houselots? A. Yes.

Q. And how would you go to the Sister's school from your aunt's?

A. Through Keawe Street and through the other side of the bridge.

Q. You would walk down Keawe Street past Hoffschlaeger's on Wainuenue Street and after to the Sister's school? A. Yes.

Q. And all this time when you were living at Mrs. Cabrinha's you had to pass Hoffschlaeger's store every day to go to school?

A. No, I cut through the other bridges.

Q. But which way did you generally go, through Keawe street, and on your way out in the morning and you would come back the same way?

A. Sometimes.

Q. But sometimes along Keawe Street?

A. Yes.

(Testimony of Margaret Fraga.)

Q. And while living at your aunt's you got to know that—where this elevator was, and what it was used for? A. Yes.

Q. Because you saw it open?

A. I saw them unloading freight there.

Q. As a matter of fact, you saw them unloading freight there quite a number of times a day?

A. Yes.

Q. You had seen freight there very often, and you know what it is for? A. Yes. [154—15]

Q. Now having heard this call that Mr. Borden made, "Here comes another duchy," you took a step and found yourself falling in the hole?

A. Yes.

Q. And up to that time you had been looking where you were going? A. Yes.

Q. Now when you fell into the hole do you remember hitting anything?

A. I do not. No, I got down there I was dizzy.

Q. Things were going around?

A. Yes.

Q. Little dizzy? A. Yes.

Q. You got less dizzy as the elevator was coming up towards the sidewalk? A. Yes.

Q. What was the first thing you knew when you got over this dizzy spell?

A. When I was at the top of the sidewalk?

Q. When it was coming up nearly up to the sidewalk?

A. I saw myself in the boy's arms.

Q. You saw that he had you in his arms?

(Testimony of Margaret Fraga.)

A. He was holding me.

Q. He was holding you by one arm?

A. I suppose so. Yes.

Q. And you were standing up?

A. Yes.

Q. Then when the elevator came right up to the sidewalk you say that some one said, "she ought to be taken home?" Who was it that said that?

A. I don't know. I think it was a Japanese, the one who was holding me said that. [155—16]

Q. Then what did you say?

A. I told them that it was no use going home as there was nobody at home. I wanted to go over to my auntie's store as my mother was there.

Q. How did you go over to Mrs. Cabrinha's store?

A. This boy took me there—this Japanese boy.

Q. You walked over? A. Yes.

Q. Was he helping you?

A. He was. He was holding me and I was holding the handkerchief over my eye.

Q. You knew then that your eye was cut?

A. Yes.

Q. Don't you remember, Margaret, that being a girl the first thing you thought about was your eye, and you asked the Japanese boy when you were at the bottom of the elevator or coming up whether your eye was badly hurt?

A. If I did, I don't remember.

Q. This little mark over your eye is a mark, is it,

(Testimony of Margaret Fraga.)

that cannot be seen unless one looks for it very closely?

A. It was a mighty deep hole. Yes.

Q. Unless you told them it was there and pointed it out to them they would not know it was there?

A. If my eye was closed they could see it.

Q. If you were asleep lying down, or taking a nap, with your eyes closed a person could see it?

A. Yes.

Q. As you go about, generally, walking around nobody would see it unless you showed it to them?

A. Yes. They would see a deep hole over my eye.

Q. When you say deep hole, what do you mean?

A. It did not go right in the eye, it was in the eyelid. [156—17]

Q. Now, what other marks did you notice on you, when you, before you had gone to the doctor?

A. I saw that both elbows were scratched.

Q. Are there any marks there now? A. No.

Q. And how long did those scratches last?

A. Well, we kept on curing them daily.

Q. What do you mean by curing?

A. Putting medicine on it.

Q. What kind of medicine?

A. Doctor Osorio gave me some ointment to put on.

Q. When did they go away?

A. When I went to school they were still healing.

Q. You went to school on what date?

A. In September.

(Testimony of Margaret Fraga.)

Q. Now, about when?

A. I got hurt on August 20th and three weeks in bed and then I went to school. It would be somewhere around the 11th of September.

Q. Did you not tell Mr. Russell that those scratches went away in about two weeks?

A. Well, yes, one arm was kind of healing and then went away.

Q. One arm was just about healing when you went to school, and the other arm?

A. I mean they were still there but were all gone when I went to school.

Q. Where else had you any scratches besides your arms?

A. My left hip bruised.

Q. Not scratched? A. Yes. [157—18]

Q. How long did that last?

A. It lasted quite a long time; I don't quite remember.

Q. About how long? About two weeks?

A. I don't know how long; about a month.

Q. And about how long about the bruise on the left hip?

A. I think it had got cured before the thigh.

Q. That is all the signs, all the marks, disappeared before four weeks, the forearm and the elbow? A. Yes.

Q. The scratches on the elbow, the bruise on the left hip had gone before four weeks, now what other marks had you?



(Testimony of Margaret Fraga.)

A. There were not other marks left; my knee was scratched.

Q. Had you any other scratches? A. No.

Q. And whereabouts was the left knee scratched?

A. Right on the kneecap.

Q. When did that scratch go away?

A. When I went to take the first X-ray of the leg the scratch was still there so I don't remember.

Q. You had the first X-ray taken before you went to school? A. Yes.

Q. You went to take the first X-ray two weeks after you had the accident?

A. I am not quite sure.

Q. The last time you saw the scratches was the day you went to have the X-ray taken?

A. Two days after that it was gone. [158—19]

Q. Now, Margaret, how do you remember that two days after you went to have the X-ray taken the scratches went away?

A. Because on the Sunday I walked around and looked at my knee and the scratches were healed.

Q. All the marks were gone; on a Sunday; you took a walk around the house? A. Yes.

Q. And you looked at your knee? A. Yes.

Q. And that two days after the X-ray it was already gone? A. Yes.

Q. You said something about not knowing that your back was scratched til you got to the doctor's?

A. Yes.

Q. Where was your back scratched? Right on the back bone? A. Right across the hip.

(Testimony of Margaret Fraga.)

Q. Was that the same place on the left or right hip?    A. Near the left hip.

Q. Part of the same scratch as on the hip?

A. About the middle of it.

Q. When did that one go away?

A. There was no scratch there.

Q. I thought you said you did not know that your back was scratched?

A. I did not know that it was scratched, it was bruised.

Q. Until you got to the doctor's because he examined and found that it was bruised?    A. Yes.

Q. When did that bruise go away?

A. About the same time as the hip. [159—20]

Q. So that at the time you went to school nearly all these marks had gone?    A. Yes.

Q. What, if any, were left?    A. None.

Q. That is right?    A. Yes.

Q. They were all gone?    A. Yes.

Q. Now, what did the doctor do for you when he put you to bed?

A. He rubbed some kind of medicine and put hot-water bags on the hip and back and on the knee.

Q. And how long did those stay on?

A. Well, I kept on changing them until I got out of bed.

Q. You went to school on a Monday? Three weeks after that on Monday?    A. Yes.

Q. And it was on a day before, a Sunday, that you looked while walking around the house, that

(Testimony of Margaret Fraga.)

the marks had all gone off of your knee. Was it a week before that?

A. When I took the X-ray a week before.

Q. You took the X-ray about two weeks after you were hurt, and went to school three weeks after you were hurt? A. Yes.

Q. During the week between the time you took the X-ray and went to school, were you walking around the house?

A. Not regularly in bed.

Q. But how about the two weeks before the X-ray, you were in bed, but after the doctor had the X-ray taken he told [160—21] you you could walk around?

A. He told me to stay in bed as the bone was cracked and to stay in bed.

Q. And told you to stay in bed? A. Yes.

Q. But you did not stay in bed, but got up and walked around the house? A. Yes.

Q. During this time you were lying in bed what pains did you feel?

A. My back was hurting me and my hip and my knee.

Q. When you laid on it?

A. When I laid on it.

Q. And the hip when you touched it?

A. Yes.

Q. And if you did not touch it?

A. Once in a while.

Q. You mean once in a while it would pain if you did not lie or touch it? A. Yes.

(Testimony of Margaret Fraga.)

Q. How about the knee?

A. Pained me always.

Q. Whereabouts did it pain?

A. The sides of the kneecap.

Q. And what kind of a pain was it?

A. A pain.

Q. Not a shooting pain, but a dull pain, was it?

A. Yes.

Q. Had you any other pains at that time?

[161—22]

Q. You have told us that your back, hip and knee pained you; had you any other pains?

A. My head pained me on account of my eye, and still pains me.

Q. Had you any pains in your head before this?

A. Never before. I had slight headaches.

Q. Is it not a fact that in the school year before the accident that you continually had light headaches and you complained to your teacher about them? A. No.

Q. That you had light headaches, and they used to go away? A. Yes.

Q. How often did you have these?

A. Once in a while. When the day was hot I had them.

Q. About how often did you have these headaches? I am talking before the accident.

A. I do not know.

Q. Once every day?

A. Maybe once in a week.



(Testimony of Margaret Fraga.)

Q. And is it not a fact, Margaret, that before the accident happened you had those pains and used to stay away from school.

A. I never stayed home from school.

Q. The school term before the accident; take from January to June of last year?

A. No, I never stayed at home.

Q. You never were marked absent from school?

A. No. [162—23]

Q. Now, Margaret, is it not a fact that before this accident that, take the month of February, 1920, you were away from school for four days?

A. No, I was never absent.

Q. That is on the 4th, 6th, 10th and 11th of February, 1920; that you were away from school on the 9th of March; that you were away from school on the 3d of May; that you were away from school the 8th, 9th, 10th and 29th of June?

A. This was after I got hurt.

Q. Before you got hurt? About the month of February, March, May and June, 1920? You were hurt on August 20, 1920. A. No.

Q. Is it not a fact that in the month of November, 1919, that is the school year before this one, that you were away from the 5th, 6th, and 7th and the 24th?

A. Before I got hurt? I don't remember missing school.

Q. Now, you say that your knee was paining you at the side of the kneecap? A. Yes.

Q. Which knee? A. The left knee.



(Testimony of Margaret Fraga.)

Q. Nothing wrong with the right knee? A. No.

Q. Did you not tell the jury in answer to Mr. Russell that it was the right knee that was scratched?

A. No. The left; both were scratched.

Q. You told Mr. Russell you had pains in the right knee?

A. Maybe, I misunderstood Mr. Russell.

Q. Now, you say that *you* leg swelled up?

A. Yes. [163—24]

Q. Which leg? A. The left leg.

Q. And when did you first notice that it was swelling?

A. The day that I took the X-ray, I noticed it was swollen; we called Doctor Osorio and he took me down to see if—

Q. It was when you went down to take the X-ray you mean to Dr. Sexton's?

A. At home, it was swollen, and I called Dr. Osorio and he took me with him to have the X-ray taken.

Q. That is the first time you noticed the swelling in the knee? A. The whole foot.

Q. Do you mean the foot or the leg?

A. The whole foot, the whole leg down to the foot.

Q. And you pointed to your calf and to your ankle, in fact Mr. Russell said your calf; is that the place? A. Swollen at the calf and the ankle.

Q. Now, what did the doctor do for that?

(Testimony of Margaret Fraga.)

A. He gave me some medicine to rub on it and hot-water bags.

Q. You had had water-bags before?

A. Even now I put it on.

Q. How often does it pain you?

A. It pains me always; but sometimes it pains more than the other.

Q. How often does it pain so you have to put the hot-water bag on?

A. I do not quite remember.

Q. Well, how long ago did you put on the hot-water bag?

A. About two weeks when I went out and I came home I put the hot-water bag on. [164—25]

Q. And how long before that?

A. I do not remember. I do not know.

Q. Is it so long ago you do not remember?

A. A short time ago.

Q. About how long ago? A. I do not know.

Q. How long since you last had it?

A. Two weeks from now.

Q. But you do not know how long before?

A. I do not remember.

Q. You say it does not pain you now because you have a rubber band. A. Yes.

Q. How long have you had a rubber band on?

A. I do not remember.

Q. About how long? Would it be a month?

A. Longer than that.

Q. A rubber band about a month ago?

A. About that time.

(Testimony of Margaret Fraga.)

Q. Was it before or after you went to the doctor's for the second X-ray?     A. It was after.

Q. How long after?

A. I don't know. It has been about two months.

Q. But since you put the rubber band on you don't have so much pain?     A. No.

Q. As you told Mr. Russell, once in a while it pains you, but the pain is not much now as I have a rubber band on it?     A. Yes. [165—26]

Q. Now, you said something about,—you said that your bones were going back and forth; what do you mean by that?

A. When I spoke of the—the bones,—the two joints go together.

Q. Whereabouts are those two joints?

A. Near the knee.

Q. It feels as if there were two bones there going together?

A. When I spoke I meant that it feels as if there were two bones going together.

Q. You feel as if two bones go against each other?

A. Yes.

Q. What kind of a feeling is it?

A. Mighty hard to describe.

Q. Do the best you can?

Q. Has anybody told you about two bones coming together?     A. I learned it at school.

Q. You learned it at school—what two bones coming together?

A. Whenever you move two bones go together.

(Testimony of Margaret Fraga.)

Q. Like the elbow goes—the two bones in the elbow go one against the other? A. Yes.

Q. How does it feel? You mean it feels as if the side bones and the leg bones were going together or what?

A. I do not know—I cannot describe it.

Q. It is only something you can feel yourself?

A. Yes. [166—27]

Q. You can't feel two bones when you put your hand on it, that there might be two bones there?

A. There is a real feeling.

Q. Now, you say, Margaret, that you drive to school in an automobile? A. Yes.

Q. Do you do any walking at all?

A. I walk around the house.

Q. Do you do any other walking?

A. While we are changing rooms at school.

Q. You don't walk around downtown at all?

A. No.

Q. Are you sure of that? A. I never walk.

Q. Is it not a fact that you, since you got hurt, have walked around town, down Wainanuenue Street and walked down Keawe Street?

A. Well, I hardly walk around.

Q. Do you mean that you never walk around the town?

A. But since I got a car what is the use of my walking.

Q. I am not asking what is the use of walking. Is not it a fact that you do walk around town?

A. I do not understand you.



(Testimony of Margaret Fraga.)

Q. Is it not a fact that since you got hurt you have been walking around town? Is not that true?

A. Well, I have not been walking regularly around town.

Q. But you have been walking around only just short distances?

A. Only when I got off the car.

Q. Have you not walked down Waianuenue and Keawe Street at any time? [167—28]

A. Never walked down any distance, except yesterday from here down to the Hilo Drug Store to get a car.

Q. Is it not a fact, Margaret, that since your accident you have walked that distance,—walked along around Keawe Street to your uncle's store?

A. I have not.

Q. Have not walked past Keawe Street at all? Along Waianuenue Street to Keawe Street and on Keawe Street?

A. Never have except around our yard.

Q. Around your yard at your home lot?

A. Yes.

Redirect Examination of Witness MARGARET FRAGA by Mr. RUSSELL.

Q. You said, Margaret, in answer to Judge Stanley's question, that you had seen loading of freight from the elevator in front of Hoffschlaeger's store before the time of the accident. Do you remember how many times you saw that?

A. Don't remember how many times, but remember seeing it.



(Testimony of Margaret Fraga.)

Q. But you can't give any idea as to how many times you saw this? A. No.

Q. Did you see it more than once?

A. More than once.

Q. Can you tell, when a few times? How many times you saw it.

A. Do not quite remember; seen it more than once or twice. [168—29]

Q. Upon those times did you see the iron grating there. A. Yes. I saw the railing open.

Q. What did you see there at the time, the sides opened up? A. Yes.

Q. Both sides or one? A. Both sides.

Q. What do you mean the railing?

A. The sides were up.

Q. Were there any people there? A. Yes.

Q. All of the times that you saw this grating open? A. Yes.

Q. When you saw the grating open just how do you mean? A. Well, standing straight.

Q. You said that during the three weeks that you were in bed that there were times that you walked around the house? A. Yes.

Q. About how many times?

A. When I go around the parlor and go back to bed.

Q. And how often? A. A few times a day.

Q. Will you state whether or not it was in response to natural demands? Know what I mean? When you had to go to the toilet? A. Yes.

Q. Would you get up at any other times?

(Testimony of Margaret Fraga.)

A. To go to the kitchen to get a drink of water.

[169—30]

Q. You will show that rubber band on your knee to the jury?

(Showing of rubber band by witness to the jury.)

Q. (By Judge STANLEY.) That rubber band is a tight band? A. Yes.

Q. (By Mr. RUSSELL.) It is,—it fits quite tightly around the knee? A. Yes.

That is all.

No recross-examination by defense.

**Testimony of Alfred E. Souza, for Plaintiff.**

Swearing in of witness by Clerk of the Court:

Q. What is your name?

A. Alfred E. Souza.

(Examination of Witness by Mr. RUSSELL.)

Q. What is your occupation?

A. Bookkeeper and X-ray operator.

Q. And you are X-ray operator for whom?

A. L. L. Sexton.

Q. How long have been employed as X-ray operator? A. Five years.

Q. And that is since Dr. Sexton first installed the X-ray machine? A. Yes.

Withdrawing of witness Alfred E. Souza, and recalling of witness Margaret Fraga for recross-examination by Judge STANLEY.

**Testimony of Margaret Fraga, in Her Own Behalf  
(Recalled—Recross-examination).**

(Examination by Judge STANLEY.)

Q. Margaret, you said to Mr. Russell that you had [170—31] been to Dr. Sexton's office twice in order to get an X-ray picture taken? A. Yes.

Q. You have told us about your pains in the knee? A. Yes.

Q. You said also that Mr. Souza took the X-ray pictures? A. Yes.

Q. Do you remember talking to Mr. Souza on the second visit as to whether you had any pains or not? Do you remember telling Mr. Souza at that time when you went there the second time that you had not had any more trouble?

A. I do not—it may be or may not be.

**Testimony of Alfred E. Souza, for Plaintiff (Recalled).**

(Continuation of Examination by Mr. RUSSELL of Witness ALFRED E. SOUZA.)

Q. You take the photographs that are taken by the instrument of Dr. Sexton? A. I do.

Q. And you develop them? A. I do.

Q. These photographs are taken for other physicians and surgeons? A. Yes.

Q. Do you know whether in the course of practice of other physicians and surgeons they act upon the photographs that are taken by you?

A. I do. [171—32]

(Testimony of Alfred E. Souza.)

Q. Do you recall having taken an X-ray photograph of the left leg of Margaret Fraga?

A. I do.

Q. How many times?

A. She was there three times.

Q. And do you know the date of the first time?

A. September 4th.

Q. I will show you an X-ray photograph plate upon which there is noted a memorandum "Margaret Fraga, September 20, 1920," and ask you if that is one of the photographs, plates, taken by you at that time?     A. That is one of them.

Q. And I will show you a print and will ask you if that is a print developed from that plate?

A. It is not.

Q. Another one, and if that is the one?

A. That is one of this plate.

Q. Do you recall at whose request these were taken?

A. That first plate was taken at the request of Dr. Osorio.

The plate and print referred to, offered in evidence by Mr. Russell; no objection by Judge Stanley; marked Plaintiff's Exhibits "B" and "C."

Mr. RUSSELL.—That is the plate upon which is noted the name "Margaret Fraga, dated September 4th, 1920, be exhibit 'B' and the photograph marked exhibit 'C.' "

Q. I show you a print upon which there appears the name of some sort, the words "Dr. L. L. Sexton" underneath which the number "2945" and will ask



(Testimony of Alfred E. Souza.)

you if that was a photograph taken by you of Miss Fraga's knee? A. That was. [172—33]

Q. Remember when that was taken?

A. March 4th, 1921.

Mr. RUSSELL.—I offer this plate in evidence.

Judge STANLEY.—No objection.

Judge THOMPSON.—May be so admitted and marked Plaintiff's Exhibit "D."

Mr. RUSSELL.—There are two of them. Can refer to them as two exhibits. The plate upon which is shown the name L. L. Sexton as Plaintiff's Exhibit "D" and the plate on the opposite side of the sheet, be indicated as Plaintiff's Exhibit "E."

(Continuation of Examination by Mr. RUSSELL of Witness ALFRED SOUZA.)

Q. I will show you a print and will ask you if that is a print made from the plate, Plaintiff's Exhibit "D," March 4th plate? A. It is.

Q. And I will offer that in evidence and marked Plaintiff's Exhibit "F."

Judge THOMPSON.—It may be admitted and so marked.

Q. I will show you another print. We will ask you if that is a print taken from Plaintiff's Exhibit "E"? A. It is.

Mr. RUSSELL.—I will offer that in evidence to be marked Plaintiff's Exhibit "G."

Q. Now, I show you the sheet containing the prints, Plaintiff's Exhibit "D" and "E"; were they taken on the same day? A. Yes



(Testimony of Alfred E. Souza.)

Q. March 4th.      A. March 4th, 1921. [173—34]

Q. You say that you took a third picture?

A. Three times.

Q. When was the last time?

A. The last time was March 4th. Last time September 4th.

Q. And she was there September 9th. Was there a plate taken on September 9th?

A. A picture of her back.

Q. The pictures of her leg were taken only on September 4th and March 4th.

Cross-examination of Witness ALFRED SOUZA  
by Judge STANLEY.

Q. Mr. Souza, if it became necessary in the trial to take a picture of both knees of the plaintiff, how long a time could that be done?

A. Be about an hour, to have the plates taken and developed.

Q. These exhibits "D," "G," and "F" are plates taken of the plaintiff's knee and leg?

A. They are.

Q. And which knee?      A. Left knee.

Q. Can you say that they were taken at the same or different angles?

A. The second one a little different angle; from the first one from the exhibit "D."

Q. And the third one—what do you say in regard to same? [174—35]

A. I could not say unless I took a picture. One of these pictures is a side view and the other—this one is Exhibit "D," first one.

(Testimony of Alfred E. Souza.)

Q. I was referring to "G," this one?

A. That is just the front view. Posterior view.

Q. Now this is a totally different picture?

A. Yes.

Q. This is Exhibit "B"; Exhibit "D" is anterior and posterior view, and Exhibit "E," that is a side view; that is, taken at different angles from "G." Exhibits "B" and "E" are both side views? A. They are.

Q. But at different angles?

A. Entirely different.

Q. You say the plaintiff, the girl, went to the office on three occasions? A. Three occasions.

Q. Had you any talk with her on the last occasion? A. Yes.

Q. And what was the conversation?

Mr. RUSSELL.—I object, if your Honor please, that it is not proper cross-examination, and all that the witness was called for was to testify to some mechanical work that the witness did, and if there are any questions that counsel would like to ask, I should think that the defendant should call him as its own witness.

Judge STANLEY.—We submit if the Court please, it is proper that the plaintiff being there, that this witness tell what the plaintiff said there at that time. It is certainly admissible. [175—36]

Mr. RUSSELL.—I brought him here for the purpose of testifying as to the printing of the X-ray pictures and no conversation that he had with the plaintiff; and in the direct examination I only

(Testimony of William G. Souza.)

asked him pertaining to the matter of these prints and I submit, if the Court please—

Judge THOMPSON.—In your examination of Miss Fraga I believe you asked her if she had a conversation with Mr. Souza, and I think she said yes.

Judge STANLEY.—The question was asked her whether she made any statements at that time. Her answer was she might have made them and she might not.

Mr. RUSSELL.—At the present time they have no right when he is my witness to—we did not question this witness whether he had any conversation with the plaintiff and they have no right to cross-examine him concerning this.

Judge THOMPSON.—The Court sustains the objection.

Judge STANLEY.—Note an exception.

(Continuation of Examination by Judge STANLEY.)

Q. Did you at that time have any conversation with the plaintiff as to whether she was having pains or not?

Mr. RUSSELL.—Same objection.

Judge THOMPSON.—Objection sustained.

Judge STANLEY.—Note an exception.

**Testimony of William G. Souza, for Plaintiff.**

Swearing of witness by Clerk of the Court:

Q. What is your name?

A. William G. Souza.

(Testimony of William G. Souza.)

Direct Examination of Witness by Mr. RUSSELL. [176—37]

Q. What is your name?

A. William G. Souza.

Q. You are employed by whom?

A. Hilo Stationery Company.

Q. Where were you employed last August?

A. Hoffschlaeger & Company.

Q. How long were you in their employ?

A. Six years, four months.

Q. Since when did you leave them?

A. Last day of December, last year.

Q. Do you remember the occasion of Miss Fraga's accident there? A. I do.

Q. Were you working for Hoffschlaeger & Company at the time? A. I was.

Q. In what capacity? What was your work?

A. Shipping clerk.

Q. Just before the accident,—rather, did you have any work in connection with the loading of freight there? A. I had.

Q. State just what you did?

A. I gave orders to the boy to get some freight at that moment, because the truck was to come to get the freight in a few minutes.

Q. At the time of the accident there was a truck coming to get some freight from there? A. Yes.

Q. The freight was from Hoffschlaeger Company and it was to be shipped out?

A. Yes, to be shipped out. [177—38]

Q. It was under your charge?



(Testimony of William G. Souza.)

A. Under my charge.

Q. Did you see Miss Fraga fall through the shaft? A. I did.

Q. Will you state—describe the opening? Just how was it opened. Towards the street both directions? I will show you a photograph and will ask you if that is the manner in which that opening appeared at the time Miss Fraga fell in?

A. Just as it is there.

(Photograph of grating admitted in evidence; no objection by defense, and marked Plaintiff's Exhibit "H.")

Q. What was the occasion of the grating being opened at that time?

A. Put up for some freight?

Q. Where were you at the time it was opened?

A. I was inside.

Q. Did you know Margaret Fraga at that time?

A. I did not know her. Did not recognize her.

Q. Did you know who she was?

A. I know who she was.

Q. Where were you at the time she fell in?

A. At the door outside leaving the main sidewalk the other side of the door.

Q. The door at the angle?

A. The door inside not even with the sidewalk.

Q. That is you were in the vestibule?

A. Yes.

Q. Now I will show you this photograph, Plaintiff's Exhibit "H" and will ask you if the door appearing there is the one? [178—39]



(Testimony of William G. Souza.)

A. No, the next one.

Q. Hoffschlaeger Company occupy two stores, adjoining? A. Yes.

Q. The elevator referred to is on the Puueo side of the Puueo store of these two? A. Yes.

Q. And you were standing in the doorway of the Waiakea store? A. Yes.

Q. So that you were about how far away from this grating? A. About 20 feet.

Q. And you were standing in the vestibule, were you? A. Yes.

Q. Will you state what you saw? Did you watch her as she passed?

A. I came out to see if the freight was out, in the meantime she passed and she was on the Puueo side of the office. I think she passed—I called, I seen her walking towards Cabrinha store side and I stood there looking toward her direction; she simply walked straight ahead; just before she fell down remember yelling out to her to look out. She did not hear, I know she fell in.

Q. How long after you shouted “look out” was it she fell in? A. One or two steps.

Q. At that time did you notice in what direction Margaret was looking? [179—40]

A. What I remember she was looking straight ahead.

Q. Do you know young Borden? A. I do.

Q. Do you remember having seen him across the street? A. I do.

(Testimony of William G. Souza.)

Q. Do you remember if there was any talk between the two? A. I don't remember.

Q. This all happened in just a few seconds?

A. I seen Mr. Borden across the street and it must have been a minute time she fell in.

Q. You say a minute you mean the length of time it would take to count slowly sixty—from the time that you first noticed that Margaret was heading for the hole so as to suggest to you to call to her it was only a second or so?

A. Two or three seconds.

Cross-examination of Witness WILLIAM G. SOUZA by Judge STANLEY.

Q. You say you are working now for whom?

A. Hilo Stationery Company.

Q. How long have you been working there?

A. Four months.

Q. You are no longer connected with Hoffschlaeger Co. in any way? A. No, sir.

Q. Now you told Mr. Russell that this elevator was used for taking up freight and that the grating shown on the photograph was the grating covering the elevator shaft? A. Yes, sir.  
[180—41]

Q. How often in the day was the elevator used in your time?

A. At times it was not used, sometimes used the whole day long.

Q. (By Mr. RUSSELL.) Half of the grating that was up as shown on the picture, on which side was that? A. Cabrinha's side.

(Testimony of William G. Souza.)

(Continuation of Cross-examination by Judge STANLEY.)

Q. At times you say it was not used at all—was that the rule or an exception?

A. An exception.

Q. As a general thing, it was used pretty much every day?

A. Not exactly. When we needed it, we used it.

Q. Did you not tell, Mr. Souza, that it was used five or six times every day?

A. All depends, frequently have.

Q. But used every week and most days of every week. A. Most days.

Q. On some days it was used several times a day?

A. Yes.

Q. Now you say that when you first saw the plaintiff that you were in the entrance of the Waiakea store? A. Yes, sir.

Q. Of Hoffschlaeger Company? A. Yes, sir.

Q. There are two doors to Hoffschlaeger's business? A. Yes.

Q. One door being on the Puueo side and near the grating? A. Yes. [181—42]

Q. The Puueo door being shown in the picture offered in evidence as Plaintiff's Exhibit "H"?

A. Yes, sir.

Q. Do I understand that there is a similar door twenty feet away and in the direction of Waiakea? A. Yes, Waiakea side.

Q. And when you saw the plaintiff first you say

(Testimony of William G. Souza.)

she was within a step or two of the opening of the elevator?     A. Yes.

Q. And that you yelled out, but she did not appear to hear you?     A. Yes.

Q. And walked into it?     A. Walked into it.

Q. Why did you not yell out before she made that step?

A. I never thought of any danger then. I thought she was looking where she was going.

Q. Was there anything on the sidewalk between her and the grating which would have prevented seeing that one side of the grating was shut down and the other was open?

A. Nothing at all.

Q. How long is that grating along the sidewalk?

A. When it is closed?

Q. When both gates close?

A. Forty inches.

Q. And each grating being about twenty inches?

A. Yes.

Q. How wide is the grating going from the side of the store to the sidewalk?     A. Four feet.

[182—43]

Q. And do you know how wide the sidewalk is at that place?

A. About eight feet. Between eight and ten feet.

Q. Have you measured it?

A. It was measured, I have forgotten.

Q. Your best judgment is between eight and ten feet?     A. Eight and ten feet.



(Testimony of William G. Souza.)

Q. You say there was nothing whatever to prevent the plaintiff from seeing that the grating was open,—in that one-half of it was open; the other half was on the Puueo side. Was there anything to prevent her from seeing that only one-half of the grating was open if she had used her eyes?

A. I do not think so. No obstruction.

Q. None between the opening? A. None.

Q. And nothing between her and the opening?

A. None.

Q. And I understand you to say in answer to Mr. Russell that you heard no conversation between the plaintiff and anybody on the opposite side of the street, and heard no remarks passed by Mr. Borden to plaintiff before she fell in?

A. I did not.

Q. Mr. Souza, about how high above the street does that grating extend when it is open in that way? A. About seventeen inches.

Q. So that it was a grating which, when open, was plainly visible to anybody walking along and in the immediate vicinity of that shaft? A. Yes.  
[183—44]

Q. Was it so that anybody walking along the street say from the Waiakea side of your store could see that it was open?

Mr. RUSSELL.—Objection—really argumentative.

Judge STANLEY.—I submit this is cross-examination.

Judge THOMPSON.—Objection overruled.



(Testimony of William G. Souza.)

A. Anyone could have seen it was up.

Q. It was in plain view to one using their eyes?

A. Yes.

Q. Anyone that paid attention could see that the grating was up?     A. Yes.

Redirect Examination of Witness by Mr.  
RUSSELL.

Q. You said that this grating was twenty inches wide, is that based on your judgment or based upon measurement?     A. We measured it.

Q. Is it not a fact that each grating is twenty-three inches wide?     A. No, twenty inches.

Q. How deep is the elevator shaft when it is at the bottom?

A. Between eight feet and nine feet.

Q. What is the elevator shaft lined with? The walls?

A. The flooring is same, even with the wall.

Q. I mean the sides of the hole? Of the shaft? Rock or wood?     A. Rock. [184—45]

**Testimony of V. E. M. Osorio, for Plaintiff.**

Swearing of witness by Clerk of the Court:

Direct Examination by Mr. RUSSELL.

Q. Your name is V. E. M. Osorio?     A. Yes.

Mr. RUSSELL.—Will there be any objection to these (referring to prints he has in hand) being introduced in evidence at this time?

Judge STANLEY.—None.

Mr. RUSSELL.—The plaintiff offers in evidence

at this time a photograph bearing the number mark 1014 as print of X-ray of plaintiff, portion of left leg.

(Admitted and marked Plaintiff's Exhibit "I," and it is admitted that the same is a photographic print of the X-ray of her left leg.)

Mr. RUSSELL.—We also offer in evidence an X-ray photographic print bearing the number 1015, as a photograph of a portion of plaintiff's left leg.

(Admitted and marked Plaintiff's Exhibit "J.")

Mr. RUSSELL.—Will the defendant admit that it is a photographic print of the X-ray negative? Judge STANLEY.—Yes.

Mr. RUSSELL.—The plaintiff offers in evidence a photographic plate from which were printed the photographs, Plaintiff's Exhibits "I" and "J."

(Admitted and marked Plaintiff's Exhibit "K.")

Mr. RUSSELL.—The plaintiff offers in evidence the photographic print bearing the number 1016 as a photographic print of the plaintiff's right leg.

(No objection, admitted and marked Plaintiff's Exhibit "L.")

Plaintiff offers in evidence a photographic print bearing the number 1017 as a photographic print of plaintiff's right leg. [185—46]

(No objection, admitted and marked Plaintiff's Exhibit "M.")

Plaintiff offers in evidence an X-ray photographic plate from which were developed the prints constituting Plaintiff's Exhibits "L" and "M"; no objection, admitted and marked Plaintiff's Exhibit

(Testimony of V. E. M. Osorio.)

“N.” Made at the office of Dr. L. L. Sexton, May 24, 1921.

(Examination of Witness by Mr. RUSSELL.)

Q. You are Doctor V. E. M. Osorio? A. Yes.

Q. And you are a practicing physician and surgeon in Hilo? A. I am.

Q. How long have you practiced, Doctor?

A. One and one-half years.

Q. That is in Hilo? A. Yes.

Q. And prior to that time?

A. Cleveland, Ohio; and France.

Q. You were practicing in France with the American Expeditionary Forces? A. Yes.

Q. How many years have you practiced?

A. Five years.

Q. You know the plaintiff in this case, Margaret Fraga? A. Yes.

Q. Did you have occasion to attend her last August? A. About that time.

Q. Can you tell as to when you first attended her?

A. During the latter part of the month; don't know what date. [186—47]

Q. What was the occasion of your first attention?

A. She was brought to my office with some injuries.

Q. You were informed that the accident occurred that day? A. Yes, sir.

Q. You made an examination of her? A. Yes.

Q. And do you recall what you found on that occasion?

(Testimony of V. E. M. Osorio.)

A. Some of the ailments and injuries.

Q. You recall just some?     A. Yes.

Q. Will you state what those were?

A. She had an injury to her left knee, and laceration on one of the eyes,—I don't remember whether the right or left; she also complained of her back and her hip.

Q. Do you know whether there were any other injuries?     A. There were some more.

Q. Just what were these others?

A. Abrasion of her arms; don't know which one.

Q. What did you do to relieve her?

A. I gave her first aid in the office and sent her home and told her to go to bed and remain quiet for three or four weeks and that I would call at her house during that time.

Q. And how soon after that did you call?

A. Next day.

Q. Did you make an examination of her then?

A. I made a thorough examination in the office and at her house.

Q. Did you find any other developments there at that time?

A. She was unable to move herself and complained very much of her back, her eye and her leg. [187—48]

Q. Which leg?

A. Left leg especially. She complained of her right leg also.

Q. What did you find in connection with her eye?

A. She had a laceration of the upper eyelid.



(Testimony of V. E. M. Osorio.)

Q. Do you recall whether there was any other part of her head affected in any way?

A. No, I don't remember.

Q. Have you any other data with you which would refresh your recollection? A. Yes.

Q. Will you refer to such data as you have?

A. I would not like to produce it.

Q. It would only be used as a matter of refreshing your memory.

A. I have it here, but I want it back.

Judge STANLEY.—I would like to ask when that was made?

A. Right at the time of the accident.

(Continuation of Examination by Mr. RUSSELL.)

Q. At the time when you first saw the plaintiff?

A. Yes.

Q. All of them made at that time?

A. Yes. That appearing on one side (indicating on one side of card held in hand).

Q. Those on the other side made at the time you made the calls? A. Yes.

Q. Will those items appearing on that card refresh your recollection? A. Yes. [188—49]

Judge STANLEY.—If the Court please, I suggest that he be not allowed to use such documents until his recollection be exhausted.

Mr. RUSSELL.—That is perhaps right. It is a point in the discretion of the Court.

Judge THOMPSON.—Very largely, I think. I don't know of any rules of law, that is, by which



(Testimony of V. E. M. Osorio.)

the Court is supposed to cover; depending on the argument referred to, how intricate, etc.

Judge STANLEY.—Have you with you, Doctor, all the injuries from which the plaintiff was suffering at the time you saw her first visit, and your first visit to the house, that you can now recall without the aid of a memorandum?

A. I cannot, because I made this a year ago.

Q. All of the injuries without the aid of the memorandum? A. I don't know.

Mr. RUSSELL.—Q. That is if certain injuries were suggested to you, you might recall without any memoranda? A. Maybe I could.

(Continuation of Examination by Mr. RUSSELL.)

Q. Do you recall whether there were any scratches on the arms of the plaintiff at the time?

A. That is without reference to the memorandum I could not say. There were abrasions on both arms.

Q. Any bruises? A. That is the same thing.

Q. And bruises on the back? A. Yes.

Q. Will you refer to your memorandum and tell us what injuries you discovered, if those items refresh your recollection; after referring to that go over the whole list? [189—50]

A. Laceration of the left eyelid; left elbow and right arm bruised or abrasions, and also abrasion of the right forearm. Injury to the right hip, and injury to the left hip; strained back; fracture of the epiphysis of bone, left leg; sprained right foot; injury to right knee; abrasion of right and left

(Testimony of V. E. M. Osorio.)

thigh, and I have concussion of the head; it should be contusion.

Judge STANLEY.—That is what you have; the word contusion was meant; and the memoranda should have been contusion and not concussion.

(Continuation Examination by Mr. RUSSELL.)

Q. What was the date of your first examination of her?     A. You mean—

Q. Will that card refresh your memory?

A. August 20th at office.

Q. And you called at the house?

A. August 21st.

Q. When did you call after that?

A. Every day to October 9th.

Q. Did you call at the house every day?

A. Yes.

Q. Do you recall whether or not she went to school?     A. Yes, she did.

Q. You would call there after she would come out of school?     A. Yes.

Q. That is November or October?

A. That is September 9th and not October 9th.

Q. After that did you see her in the office?

A. Yes, I saw her sometimes every other day.

Q. For how long a period? [190—51]

A. Up to the 13th I saw her at the house; up to the 13th of September.

Q. From the 9th to the 13th?

A. Yes. And after the 13th I had her call at the office.

Q. How frequently?

(Testimony of V. E. M. Osorio.)

A. Sometimes every other day; every three days.

Q. When was the last time you had occasion to see her?

A. The last day I had her there; May 15th this year.

Q. And prior to May 15th did she call at your office?

A. Sometimes once a week, during the month of April I had her come three times; month of May just twice when she needed medicine.

Q. Then before April, how often?

A. Month of November, I had her four times; month of December, twice; month of January twice; February, likewise. March I had her three times and April three times.

Q. After you first began to call on her, after August 21st, will you state to *the* tell us what you prescribed and what you did?

A. I had the patient put to bed and her leg properly bandaged and demanded from the folks that she be left quiet in bed, with as little motion as possible.

Q. Did you administer any medicine?

A. Not necessarily, just medicine to soothe the nerves.

Q. Did you find any nervous condition?

A. She was somewhat nervous.

Q. And what was done, if anything, to her leg?

A. I had her kept in bed for a while and advised the folks to have an X-ray taken when she was a little better.

(Testimony of V. E. M. Osorio.)

Q. Was there an X-ray taken? [191—52]

A. Yes.

Q. I will show you Plaintiff's Exhibit "B," and will ask you if that is the photograph first taken?

A. Yes, sir.

Q. I will show you Plaintiff's Exhibit "C," is that a print from the photographic plate marked "B"?

A. This is somewhat indistinct; I would like to see the plate; the plate shows up more clearly than the print does. (Is handed plate.) Yes.

Q. That is when placed against the light?

A. Yes.

Q. Did you discover any particular condition as the result of the photograph?

A. I noticed a separation at the epiphyseal end of the bone from the main shaft.

Q. Doctor, until I came into this case, I did not know what that word was. Is that upper part of the bone separated from the main bone by cartilage substance?

A. Not a complete separation, until a certain number of years; it finally unites forming the main shaft.

Q. Doctor, will you turn to the jury and explain to them?

(Witness explains.) We have the two bones. This is the epiphyseal line. This bone is developed into and is separated from this main bone with a little cartilage and as the child develops, this line is softer,—hardens and the cartilage be-



(Testimony of V. E. M. Osorio.)

comes bone and this epiphyseal line disappears and the main bone is made, and the same thing appears up here. (Witness had during this explanation the print "C.")

Q. What was the condition that you found?

A. I found that the anterior of the epiphysis was somewhat separated from the main bone and from that part of the epiphysis. [192—53]

Q. Will Plaintiff's Exhibit "C" disclose that separation?

A. Yes. Right here (indicating). Marked with an arrow; about  $1/8$  inch from the main shaft and the epiphysis separation.

(Witness shows to the jury and explains.) This is the main shaft or main bone. This is the epiphysis separated by cartilage. The epiphysis, this part, is separated from the main bone by a distance of  $1/8$ " which extends to about  $1/2$ " inward. This is the main bone, this black dot. This is cartilage.

Mr. RUSSELL.—I wish to pass this around to the jury, the plate from which the print was taken. Will counsel consent that I make an arrow?

Judge STANLEY.—Prefer that the witness make the mark himself.

Q. Doctor, will you please indicate on this photograph by an arrow the spot concerning which you just testified?

A. After,—used a good deal and smudged up (referring to print). (Witness indicates on print in ink the locality.)

Q. Do you recall that this photograph concern-



(Testimony of V. E. M. Osorio.)

ing which you just testified, Doctor, was taken in September?

A. Yes, some time in September; I do not know the date.

Judge STANLEY.—We will admit that it was taken on September 4th.

Q. Do you recall that subsequently, on March 4th, of this year, there was another photograph taken? A. Some time in that month.

Q. I will show you Plaintiff's Exhibit "G" and ask if you recall if that is the photograph of the plate taken on March 4th? Also show you Plaintiff's Exhibit "E." A. Yes, sir. [193—54]

Q. And will ask you if that condition existed at that time?

A. This picture is somewhat in a little different angle, and shows some part of it. Different from the one already shown.

Q. So that it would show part of it?

A. Yes. Very indistinct.

Q. Can you tell from that picture as to whether or not the condition of the bone was improved?

A. To me it does look slightly improved.

Q. I will show you Plaintiff's Exhibit "D" and will ask you if you can tell anything from that?

A. No, sir.

Q. Is there any reason why you could not?

A. That is an anterior and posterior position.

Q. This is an anterior and posterior picture?

A. Yes.

(Testimony of V. E. M. Osorio.)

(Mr. Russell submits Plaintiff's Exhibit "D" to the jury.)

Q. Doctor, were *were* some photographs taken yesterday, have you seen those photographs?

A. I have not.

Q. I will show you Plaintiff's Exhibit "I" and Plaintiff's Exhibit "J," which are photographs of the left leg and the knee we have reference to, and will ask you if the condition, and also the plate from which that was taken "K," and will ask you if the condition which you testified to appears there?

A. These are very distinctly—the injury more marked than any of the other pictures. The separation is more marked.

Q. In regard to both of them?

A. I have more reference to Plaintiff's Exhibit "I." [194—55]

Q. Will you point out to the jury the particular separation there, on that?

A. This right here (indicating).

Judge STANLEY.—I notice that the witness says the "separation here"; that has absolutely no meaning when it goes on the record.

Mr. RUSSELL.—I was going to ask him to have, to indicate by an arrow, in a way so that it can be identified and ascertained, so that it can go into the record.

(Witness indicates location by arrow mark, and explains.) Where this arrow points shows you the

(Testimony of V. E. M. Osorio.)

separation from the epiphysis more distinct than in the other picture.

Q. The print that you just showed to the jury is taken from the plate marked 1014? A. 1014, yes.

Q. I will ask the jury to see the plate, the one on this side (indicating).

Q. Now, Doctor, I will show you Plaintiff's Exhibit "L" and "M," which are photographs of the right knee, and Plaintiff's Exhibit "N," which is the plate from which those photographs are taken?

A. Yes.

Q. And will ask you if there is any separation appearing in those?

A. There is normal separation which exists when your leg is flexed.

Judge THOMPSON.—What do you mean by flexed? A. When your knee is bent.

(Continuation of Examination by Mr. RUSSELL.)

Q. Now, will you take one of these exhibits, "L," of the right knee and I will hand you exhibit "I," which is a photograph of the left knee and will ask you to point out to the jury [195—56] the difference in the two.

A. This is right (indicating). This is left (indicating). There is an increased separation right through. Here is a normal separation right to the bone. Meaning the epiphysis.

Q. Doctor, is that separation of the bone testified to by you likely to produce pain?

A. Somewhat, sir.

Q. A continuous or intermittent pain?

(Testimony of V. E. M. Osorio.)

A. It may be intermittent, more likely.

Q. Do you recall any outward indications of somewhat similar injury in this leg?

A. There was a certain amount of swelling while the child—right after the injury—there was a certain amount of swelling at that knee.

Q. What was the condition that you observed that suggested to you this condition that the photograph subsequently developed?

A. Upon pressure on the knee there she was very sensitive and somewhat swollen so I thought best to take a picture and see how much, if any, of the bone is fractured or injured.

Q. And you spoke of a swelling, for how long a period did you notice that swelling?

A. I don't remember.

Q. Do you recall when you last noticed this swelling?

A. She had swellings off and on from that time—from the time of the injury.

Q. Did you examine her yesterday?

A. Yes, up at Dr. Sexton's office as I was told to do. [196—57]

Q. Did you notice any amount of swelling, below the knee?     A. Yes.

Q. To what was that due?

A. She has a rubber band on her leg and I could not say whether it was due to that at that time.

Q. Is the rubber band that she wears something that you prescribed?     A. Yes, sir.

Q. How long has she worn that rubber band?



(Testimony of V. E. M. Osorio.)

A. I don't know, about two or three months.

Q. Prior to her wearing the rubber band, did she have any swelling?     A. Yes, she did.

Q. Did she complain of pains?

Judge STANLEY.—I object, if the Court please.

Mr. RUSSELL.—Question withdrawn.

Q. Are you able to state, Doctor, as to the probabilities of the duration of this condition?

A. Well, they may continue until the bone is completely formed.

Q. Which would be about how long?

A. Between the age of 20 and 25.

Q. And in your opinion will it be cured then?

A. I think it will be. That is to a certain extent, not a complete cure.

Q. You can't state anything certain about it?

A. No, sir; bone is very uncertain.

Q. Has the plaintiff complained at all with reference [197—58] to her ability to walk?

Judge STANLEY.—I object to—

Mr. RUSSELL.—Question withdrawn; objection well taken.

Q. From your opinion what would be the natural effect upon her power to walk?

A. Why, especially in flexion; in drawing her leg outward, there would be a catch that is what she complained of.

Judge STANLEY.—We object to the answer, as it is incompetent, irrelevant and—

Judge THOMPSON.—Objection sustained. The jury will disregard the answer to the last question.



(Testimony of V. E. M. Osorio.)

Q. With that condition as you expressed it, it would be apt to be painful?

A. Yes. Yes, sir.

Q. With reference to the condition of her head, just what was that, Doctor?

A. Just more of an injury to the scalp?

Q. Has that been cured? A. Yes.

Q. An injury to the right knee, do you recall what that injury was?

A. She just complained of it.

Judge STANLEY.—I move that that answer be stricken; another statement of what witness has not complained of; unless shown as made at the time of the examination by the doctor.

Mr. RUSSELL.—Question withdrawn.

Q. At the time of the accident, when she was brought to you did she complain of injury to the right knee? A. Yes, sir.

Q. Do you recall whether there was any outward indication? A. Nothing at all. [198—59]

Q. And whatever that condition was it has been cured? A. It has been cured.

Q. As to the sprained right foot?

A. She has never complained of it.

Q. That is, since the first time?

A. Since then.

Q. You are now treating her only for the condition of the left knee, is that right?

A. No, sir.

Q. What other condition?

(Testimony of V. E. M. Osorio.)

A. She continually complains of her back. I have been treating her for that also.

Q. Can you state what condition you find there?

A. I had an X-ray taken, showing nothing at all; all I had been doing was to apply some lotion, liniment.

Q. Would the fact that an X-ray photograph would not show any condition be conclusive upon the question that there was no defect or not?

Judge STANLEY.—I object and ask that that question be stricken from.

Mr. RUSSELL.—Question withdrawn.

Q. You say you have been treating her for her back? A. Yes.

Q. Now, would the fact that an X-ray photograph would show no condition there, abnormal condition, would that mean to you that there is no condition there?

A. Not at all. Does not mean it. Does not show. The X-ray was taken only to show fractures in the bone or certain fractures in the body. [199—60]

Q. As to other conditions it would not show?

A. No.

Q. How long have you been treating her back?

A. Just off and on.

Q. Are you treating her now for anything other than her knee?

A. She complains of her eye and her head.

Judge STANLEY.—We move that this be stricken and that the jury be instructed to disregard, and that the witness be cautioned.

(Testimony of V. E. M. Osorio.)

Mr. RUSSELL.—Question withdrawn and the jury may disregard the answer.

Q. You say you are treating her for her head?

A. I have not been treating her; she complained of her head, I could not find anything.

Q. Are you treating her for anything else other than the knee and the back?

A. Not that I know of.

Q. Doctor will you describe the physiology of this part of the bone which you testified to, with reference to muscles that control the movement of the leg?

A. The particular part which we have reference to—we have the quadriceps femoris, and these muscles forming what we call patella ligamentum forming a tendon which passes over the kneecap and has its intersection at the tuberosity, at the swelling of the bone below the kneecap.

Q. Right at the point of the bone you had reference to?     A. Yes.

Q. In a very general way, will you state what experience you have had with reference to fractures of the leg?

A. I was connected with the Corrigan-Makinney Iron Works, Steel Works, Cleveland, Ohio, and had an average of [200—61] three to four cases a day, fractures; also overseas considerable amount of fractures.

Q. How considerable amount? Give us some idea of the number of cases which you have attended.

A. Maybe we have three to four, cannot say, for

(Testimony of V. E. M. Osorio.)

a period of about two months, I cannot remember, this being my share not counting the amount of fractures there.

Q. Did you make observations of the other cases?

A. Yes.

Q. Many of them?      A. Yes, sir.

Q. State approximately how many.

A. I think I saw two hundred fifty to three hundred over there.

Cross-examination of Witness Dr. V. E. M. OS-  
ORIO by Judge STANLEY.

Q. What medical colleges did you attend?

A. University of Louisville, Kentucky.

Q. How old were you when you went there?

A. Twenty-nine.

Q. What had been your business prior to that?

A. Merchant.

Q. Anything else?

A. Prior to that I was in the railroad.

Q. Prior to that?

A. Prior to that I worked with ——— for a month; prior to that I worked for the railroad.

Q. And you worked for a lawyer?

A. I worked for Calsmith for about three months.

Q. How old are you now, Doctor? [201—62]

A. Thirty-four.

Q. When did you go to college?

A. 1912—1913.

Q. Fall of 1912?      A. Yes.

Q. Graduated when?      A. 1916.

Q. What time in 1916?      A. June, 1916.



(Testimony of V. E. M. Osorio.)

Q. Now, subsequent to your graduation where did you practice?

A. I took an internship at St. Lexis Hospital, Cleveland, Ohio.

Q. How long did that internship last?

A. Almost a year.

Q. And where did you practice after that, Doctor?

A. Cleveland, Ohio.

Q. How long? A. About six months.

Q. When did you enter the hospital as an intern?

A. Don't remember the month.

Q. Can you remember the month? A. I don't.

Q. Can you give us approximately the time when you commenced your internship?

A. I think, right after school, July.

Q. When did you quit the internship?

A. I think it was in January or February, I am not sure.

Q. Your best recollection, what month?

A. That is the best I can remember. [202—63]

Q. That would be from six to seven to eight months in internship? A. It is more than that.

Q. From July, 1916, to January or February, 1917, would give you from seven to eight months, would it not?

A. About that—it was longer than that.

Q. Your best recollection you left in January or February? A. I think so.

Q. By intern, you mean what? Serving as a resident doctor at the office? A. Yes.

Q. Getting bedside practice? A. Yes.



(Testimony of V. E. M. Osorio.)

Q. Now, on the termination of your term as intern what did you do?

A. I worked for the Corrigan-Makinney people for a while, in Cleveland, Ohio.

Q. For how long?

A. I think it was up to September.

Q. In what capacity?

A. As assistant surgeon.

Q. And after that?

A. I came to the Islands for a few months, September, 1917; I think I landed here in October.

Q. And where did you practice in the Islands?

A. Hilo, Hawaii.

Q. And how long did you remain in the Islands?

A. I think I remained till May of the following year.

Q. Were you set up in practice yourself at that time? A. Yes. [203—64]

Q. And then you entered the army?

A. No, sir.

Q. What did you do?

A. I returned to the Corrigan-Makinney people in the same capacity until I was called into the army.

Q. What date was that?

A. That was in July, 1918.

Q. And how long in the service?

A. Till September, 1919.

Q. When did you return to the Islands?

A. November of 1919.

Q. And have practiced in Hilo ever since?

(Testimony of V. E. M. Osorio.)

A. Yes.

Q. Now, when you first saw the plaintiff, Margaret Fraga, you found the injuries which you read from the memorandum, by which you refreshed your memory? A. Yes, sir.

Q. The fact is, is it not, Doctor, that all of her injuries which you read to the jury, were, with the possible exception of the back trouble and injury to the left knee, which you say you are now treating, of a minor nature? With the exception of the eye also? A. Pretty bad at the time.

Q. The others then, with the exception of those three were of a minor nature? A. Yes.

Q. Very trivial?

A. I would not say trivial. Some were a little serious at the time.

Q. Will you refer to your memorandum again, Doctor, and tell us those which you, which were of a trifling nature? [204—65]

A. The bruise to the left elbow and right arm and the right forearm; the abrasion to the right and left thigh, and the rest I could not say; they were minor injuries at the time I saw the patient.

Q. Those were the ones? A. They were minor.

Q. They were trivial? A. Yes.

Q. When you speak of abrasion, what do you mean?

A. Where the surface of the skin is injured.

Q. Where the surface is scraped? A. Scraped.

Q. That is, the upper skin?

A. There are five skins.

(Testimony of V. E. M. Osorio.)

Q. And the outer one just scratched?      A. Yes.

Q. And that is all?      A. Yes.

Q. And those disappeared within one week's time?  
Trifling injuries ceased to exist?

A. I don't remember; within a few days; may be a week or so.

Q. From a medical standpoint they were not worth talking about?

A. Could not say much about.

Q. Less said about it the better?      A. Yes.

Q. Now you say the other injuries don't pass over for about a week or so. Now what injury, outside of the eye, the back, and the left leg, or knee, as you put it, come within the second class?

A. The injuries to both hips. [205—66]

Q. And then?

A. The injury to the right knee and contusion of the head.

Q. And within what time did those pass away?

A. I think within two or three weeks.

Q. So that if they were covered by you in the second class some time shortly, than the second ones would, were over when?

A. The first class lasts the shortest time; the second class lasts two or three weeks.

Q. And that left what?

A. Left the injury to the right eye and the sprained right foot, strained back and the left knee.

Q. And the sprained right foot she never complained after the first day you saw her she was in bed?

(Testimony of V. E. M. Osorio.)

A. Not any more about it. When she started into walk, she complained.

Q. And when did you last hear of it?

A. Three or four months.

Q. As far as you know that is gone?

A. So far as I know, yes.

Q. Tell us what the injury to the right eyelid was?

A. She had a laceration about  $1\frac{1}{2}$ " deep and about  $\frac{3}{4}$ " in length.

Q. That was scarred?

A. I tried not to leave a scar.

Q. And succeeded in? A. I think I did.

Q. You succeeded to the extent that any scar there, is barely noticeable? A. Yes. [206—67]

Q. And would be only noticeable if her eye were shut and you looked for it? A. Yes.

Q. And could only see if she was laying down and her eyes were shut? A. I think so.

Q. It is not a thing that would detract from her beauty? A. I don't think so.

Q. As a bachelor do you know whether it would detract from her beauty?

A. I don't think it would.

Q. Now, Doctor, you have testified that you were only treating her now for her back and her left knee? A. Yes.

Q. You testified that you took an X-ray of her back and that the X-ray disclosed no injury?

A. Yes.

(Testimony of V. E. M. Osorio.)

Q. The specialty of an X-ray is to show up injuries to bones, is it not?     A. To bones, yes.

Q. The fact that the X-ray showed no such injury, would demonstrate there was not any injury to the bone?     A. Yes.

Q. Then for what are you treating the girl's back?

A. For the complaint; for the pain.

Q. What particular part of the back?

A. The lower back, in the lumbar region.

Q. Away from the locality of the bone?

A. Including that. [207—68]

Q. And what treatment are you giving her?

A. All I have been giving her is a liniment.

Q. And I think you testified that you have not been treating her for some little time past?

A. I have been treating it not as often as I have been treating the leg.

Q. Well, for what in a medical term are you treating her back?

A. You can have an injury to the muscle; injury to the tissue, the covering of the bone, not being the bone.

Q. And for what are you treating her?

A. That is what I have explained; to the best of my knowledge to the injury done to the muscle; sprained.

Q. And what are the symptoms?

A. Pain, main symptom.

Q. What symptoms are there there, that outside



(Testimony of V. E. M. Osorio.)

of the fact that the plaintiff complains she has pain?

A. Just when I touch her there it hurts her.

Q. There is nothing to indicate any injury?

A. Outwardly, no.

Q. When did you treat her for this last? For her back?

A. I don't remember now. Don't know whether it was the same day I treated her for her leg.

Q. And that was on what date?

A. The last day for her leg on the 15th of May.

Q. When you say you treated her for her back, what do you mean? Do you mean gave her medicine for it?

A. I gave her medicine; a liniment.

Q. You gave her liniment?

A. She cannot do it herself; the folks have to do it for her. [208—69]

Q. And that is the only thing that you have given her for the complaint in the back? A. Yes.

Q. When was it, Doctor, you took the X-ray of her back?

A. I think it was a few days after I took the other?

Q. September 9th of last year, same time as you took the foot? A. I am not sure.

Q. Now, Doctor, when you saw the girl hurt what did you diagnose as being the condition of her left knee?

A. Why, when she came in she limped a little on

(Testimony of V. E. M. Osorio.)

the left knee, and at the time I touched her it kind of pained her a little; I did not think it serious.

Q. Am I right to say, Doctor, that she limped a little, pained her a little, you did not think anything serious? A. At the time, yes.

Q. You mean that you found out from what she said that her knee pained her a little?

A. I found—I know of my own mind, by touching.

Q. By touching her you found she complained of pain? A. Yes.

Q. What part?

A. The lower part where the tendon passes over the bone.

Q. About 2" is it not, below the knee proper?

A. Not exactly.

Q. I should say about 1¼" below the knee?

A. Yes. Make it about 1" from the joint.

Q. Would it be an inch from the tibia to the joint? From the head of the tibia, and 1" below the head of the tibia? A. Yes. [209—70]

Q. Now, Doctor, did you find anything else at that time on your first examination regarding the left knee, except on touching her at the place you have indicated she complained of a little pain?

A. No, I did not because there was a certain amount of swelling already.

Q. Did you find anything else except on touching the place indicated she complained of pain, and the fact that you noticed that she limped?

A. Just that swelling?

(Testimony of V. E. M. Osorio.)

Q. It was a slight swelling? A. Quite a little.

Q. You say that you did not think it serious at that time?

A. At that time, but I advised her to keep off that foot, to go home immediately and go to bed.

Q. Why did you do that if you did not think it serious?

A. To see if the swelling would subside the next day and tell more about it.

Q. And has the swelling subsided.

A. The swelling remained about the same, and I treated her as an injury of the bone.

Q. And what treatment did you give her?

A. Rest in bed, bandage.

Q. At that time, second time, what did you diagnose the injury?

A. I still thought about the same, not knowing the injury there, I waited a few days.

Q. At that time you did not make any definite diagnosis? A. I did not. [210—71]

Q. When you say the injury was there, but did not know it was fracture, what did you mean?

A. It might mean a bruise. Yes, it might mean a bruise of the periosteum.

Q. What else could it mean besides?

A. It may be the bursitis.

Q. What is that?

A. That is the covering right below the muscle; below the muscle and above.

Q. That means a bruise of the cartilage?

A. No, not necessarily.

(Testimony of V. E. M. Osorio.)

Q. Would those symptoms given, that is pain on touching her, and the fact that she was limping and there was a swelling indicate a bruise of the cartilage?     A. It could indicate that.

Q. Would it be a bruise of the bursis?     A. Yes.

Q. Or the cartilage?     A. Yes.

Q. What was the treatment like in bed?

A. Quiet, and bandage the leg tight.

Q. Bandage with adhesive strap?     A. Yes.

Q. Now, Doctor, when did you make a more definite diagnosis of the injury?

A. I think it was about the fourth day after the injury.

Q. And what was your diagnosis at that time?

A. I thought there was a fracture?

Q. Fracture of what, Doctor? [211—72]

A. Of the bone.

Q. Of what bone are you referring to?

A. The tibia.

Judge THOMPSON.—Which bone is that?

A. Large bone below the knee.

(Continuation of Examination by Judge STANLEY.)

Q. The bone of the leg of an adult has two bones?

A. Yes.

Q. The large bone in front, in my case a small, called the tibia, another bone in the rear to the side called the tubercle?     A. Yes.

Q. Now, what part of the tibia, the main extension, in an adult, from the knee joint down to the ankle, did you diagnose as being fractured?



(Testimony of V. E. M. Osorio.)

A. I took it to be the epiphysis of the bone.

Q. What do you mean by the epiphysis of the bone?

A. By epiphysis, the soft part of the bone, that last part that is formed in an adult, and becomes bone.

Q. Do you mean the extreme upper part of the tibia?

A. No, sir. I want to explain; there are two ends there.

Q. I Understand that there is an epiphysis at each end? A. Yes.

Q. Of the tibia? A. Of all bones.

Q. The upper epiphysis is the extreme end of the bone next to the knee-joint; is that right?

A. Yes, and becomes bone after, the tibia; that is called the epiphysis. [212—73]

Q. Do I understand you, that you diagnosed the injury to this girl as being a fracture to the whole of that epiphysis? A. Yes.

Q. To the whole extension of the epiphysis?

A. Yes.

Q. In a child, is it not true, Doctor, that you have got the epiphysis at each extension of the bone? A. Yes.

Q. That epiphysis itself is bone, is it not?

A. Yes, soft bone.

Q. Bone of only soft nature? A. Yes.

Q. What comes next, immediately below the epiphysis? A. Cartilage.

Q. And immediately below the cartilage?



(Testimony of V. E. M. Osorio.)

A. Is the hard bone.

Q. So this cartilage joins the epiphysis, which is bone, to the shaft of the bone? A. Yes.

Q. And what is that cartilage which separates the epiphysis from the shaft, called?

A. Cartilage.

Q. Is it not called the epiphyseal cartilage?

A. Yes.

Q. In an X-ray picture, Doctor, it is shown and indicated as the epiphyseal line? And in an X-ray plate does that line appear lighter or darker than the bone? A. Lighter.

Q. Lighter, and the bone appears dark in the plate? A. Yes. [213—74]

Q. And it is the opposite in the print? A. Yes.

Q. Now, Doctor, I will show you exhibit "C," which is a print of the first plate we took on September 4th, and ask you to state whether or not that shows the upper epiphyseal line.

A. Yes, it does.

Q. Could you indicate down here please, where it commences and where it ends?

A. (Witness takes print.)

Q. Just mark its course with dotted lines?

(Witness marks with dotted line.)

Q. Will you mark, Doctor, anterior end of that line with a letter "A," mark it on the side here; and the other line "B" the right; you have marked is the epiphyseal line of separation, separating the upper epiphysis from the shaft of the bone?

A. Yes.

(Testimony of V. E. M. Osorio.)

Q. Would you mind, up there please, just marking "C," being the epiphysis proper?

A. (Witness so marks.)

Q. Is it right, Doctor, will you describe? The epiphyseal line has been from A to B, originally; it should be as now marked by you A to C? I will ask you if the part above the line A to C is the epiphysis? A. A-C is the epiphyseal line.

Q. Is the part above the epiphyseal line, toward the knee-joint, the epiphysis? A. Yes.

Q. There is, Doctor, opposite the letter "A" and in the direction of the arrow on the side of the picture a projection, has that projection any special name? [214—75]

A. That becomes the tuberosity in later life or tubercle, and that tuberosity appears on the picture as a downward shaped projection. (Witness shows the jury part referred to on picture.)

Q. Now, you say in later life that projection shown on the plate become the tubercle or tuberosity? A. Yes.

Q. At what age?

A. Usually from 20 to 25 years the bone is complete, ossified, and that is where the tubercle is, that tubercle becomes united to the shaft.

Q. It becomes united to the boney shaft?

A. Yes.

Q. At the same age in effect that this epiphyseal line, this cartilage along the epiphyseal line, becomes bone and units to the shaft at the same age?

A. Yes.

(Testimony of V. E. M. Osorio.)

Q. So that for the normal leg of a girl of this age, is there anything that separates that projection in later life, the tubercle, from the shaft of the bone?

A. Why, if you have your leg in a certain position, you have a certain amount of separation; for instance, in this picture right at "A," there is a certain amount of separation that is normal.

Q. And, Doctor, from A to C?

A. That is normal.

Q. That is a separation there of the epiphysis from the shaft? A. Yes.

Q. A separation by cartilage, which, as shown in the picture, exhibit "B," is normal? [215—76]

A. Yes.

Q. And by normal you mean in the uninjured condition? A. Yes.

Q. Or in an uninjured condition? A. Yes.

Q. So that the injury which you say is shown in the print "C" and plate "B" extends from where to where?

A. It is ordinarily marked just where the arrow is.

Q. Do you mean then from A down to the end of the projection? A. Yes.

Q. And that is the only fracture, Doctor, which you say is shown by the print and plate?

A. Yes.

Q. Now, Doctor, is that projection or tubercle at the age of thirteen, bone.

A. Soft bone. Being part of the epiphysis.

(Testimony of V. E. M. Osorio.)

Q. Have you had any experience, Doctor, with fractures of this kind?     A. Yes, sir.

Q. Of this kind, a fracture of the epiphysis?

A. Yes.

Q. Would it be correct, Doctor, what you are talking about, being at the extreme end of that projection to call that a fracture or rather separation of the tubercle, rather than a fracture?

A. No, it would be more correct, a separation of the tubercle.

Q. That is its more correct name?     A. Yes.

Q. In this girl's leg, such as you are describing?

A. Yes. [216—77]

Q. A fracture, Doctor, of the epiphysis as it is known to the doctors and surgeons, involves, does it not, a fracture of the main epiphysis?

A. Yes, sir.

Q. When I speak of the epiphysis, that is the body of the epiphysis, above the epiphyseal line and above where letter is in the picture?     A. Yes.

Q. And that is of a much more serious condition?

A. Yes.

Q. Much more serious condition?     A. Yes.

Q. And is an injury which is totally distinct and recognized as totally distinct by surgeons from a separation of the tubercle?     A. Yes.

Q. That is a distinction well recognized by all surgical authorities?     A. Yes.

Q. I will ask you, Doctor, if you did, did you furnish to the counsel in this case, and I am not attempting to violate any professional confidences, the



(Testimony of V. E. M. Osorio.)

description of the injury which is claimed in the complaint?

A. No, I have never had any consultation of the injury. The daughter asked me and I told her just what she had.

Q. Doctor, is there such an animal in the surgical world as a fracture of the epiphysis?

A. No, there is no such fracture.

Q. There might be a fracture of the epiphysis?

A. Of the epiphysis. [217—78]

Q. There might be a fracture of the epiphysis?

A. Yes.

Q. And probably this is what they mean in the complaint? A. Yes.

Q. But as you have testified, Doctor, a fracture of the epiphysis is well recognized in medical authorities as being an injury of a much more severe nature than is indicated in this case?

A. At the time of the injury the fracture of the epiphysis is more serious than the separation of the epiphysis from the bone, but a fracture will nearly always heal by first intention, and while there is a separation of that, as we call it the tubercle will not heal as fast or may not go back to its normal position due to certain amount of traction or extension.

Q. Can you produce, Doctor, any medical authority, or surgical authority which will confirm what you say that a fracture of the epiphysis, that is from A of the epiphysis shown above the line A-C will heal quicker than what you call a separation of the



(Testimony of V. E. M. Osorio.)

tubercle from the bone, from the shaft, that is that portion of the cartilage which lies below the letter "A"?

A. The only authority I can give you is what we have seen.

Q. Do you know of any medical authority, the text-books that will, that you doctors use, written by medical men, that will support that statement?

A. Maybe Albe will. I have not got his book.

Q. You know where it can be obtained?

A. I don't. [218—79]

Q. You have medical works of your own?

A. Yes.

Q. Is it not a fact, Doctor, that all the authorities say that a fracture of the epiphysis is a much more severe injury than this separation of the tubercle from the shaft of the bone?

A. It is severe at times.

Q. Is it not, Doctor, so severe that in many cases it is fatal, a fracture of the epiphysis proper?

A. It can be serious. I do not know of any.

Q. Have you had, Doctor, a case of the fracture of the epiphysis? A. I have not.

Q. Now you say, Doctor, that the injury which you find here, which would not be called a fracture, but a separation, is harder to heal than a fracture of the epiphysis, and your reason for it is that, with regard to the fracture, of the epiphysis, if it heals, or heals at all by first intention, would you mind explaining the healing by first intention?

A. By regular treatment without infection.

(Testimony of V. E. M. Osorio.)

Q. And you mean by that in a state of rest, nature gets busy and heals it?     A. Yes.

Q. And the reason why the other injury, the minor injury at the separation of the tubercle may take longer is on account of traction?     A. Yes.

Q. By that you mean, do you not, the tubercle is attached to the tendon, the quadriceps femoris, and every time the knee is flexed or extended there is a pull on that tubercle?     A. Yes.

Q. And is it not a fact, Doctor, that the treatment for that injury, this separation which you have spoken of is rest? [219—80]

A. Rest and bandage.

Q. I will ask you, if it is not a fact, Doctor, that if the leg is given rest that the process of healing generally takes place within four to five weeks?

A. Three to five weeks.

Q. At what age, Doctor, would you say that that tubercle would appear in an X-ray as of a boney nature, formation?

A. Between twenty and twenty-four. Between those ages it forms in some people.

Q. At twenty to twenty-four it would appear as complete bone?     A. Yes.

Q. But at what age would it make its first appearance in an X-ray plate?

A. I do not quite get the question.

Q. The epiphysis from A to C appears almost from birth would it not?     A. Yes.

Q. In a plate?     A. Yes.

Q. From A to C?     A. Yes.

(Testimony of V. E. M. Osorio.)

Q. Would this tubercle appear on the plate at the age of birth? A. I am not sure.

Q. You have never had occasion?

A. Not a small child.

Q. Have you had any occasion before examining this child and having an X-ray taken of her leg to deal with a question of the tubercle and its first appearance, in reference to this question at that age?

A. Well, I have seen pictures at about that age. [220—81]

Q. Is it not a fact, Doctor, at the age of thirteen, this tubercle is of a totally different character, the formation, than the rest of the epiphysis?

A. It is a boney, soft boney substance like the epiphysis.

Q. It is a fact, a much softer part than the epiphysis? A. About the same.

Q. Are you guessing now, Doctor, or are you stating from your opinion?

Mr. RUSSELL.—Object, if the Court please. All questions are asked of the witness must of necessity be of his opinion. He has never seen this bone; the leg has never been opened.

Q. Is it not a fact, Doctor, that this tubercle appears first as boney matter in a child of eleven years old? That up to that time it is more or less cartilage or bone of a very soft nature, and of a distinctly different nature?

A. At the age of thirteen, I told you it was of the same substance as the epiphysis.

(Testimony of V. E. M. Osorio.)

Q. Is it not a fact that it does not appear so different from bone until the age of eleven, that it does appear as bone?     A. Not as bone.

Q. Does not appear as bone of the same consistency, form, as the epiphysis until the fifteenth year?

A. It does appear as the same at the age of thirteen and before that.

Q. How long before that?

A. About the age of ten and twelve.

Q. I think, Doctor, the last question I was examining you on was whether the structure of the tubercle, downward [221—82] projection, tongue shaped, that you have mentioned, was the same as that of the upper epiphysis proper?     A. Yes.

Q. That is true in this case, is it not, because the tubercle has no independent center?     A. Yes.

Q. The plate shows in this case there is no distinct center of ossification for the tubercle?

A. No.

Q. If the plate had shown that there was a distinct center of ossification in the tubercle, then the boney construction of the tubercle would not be what is called the epiphysis proper?     A. Yes.

Q. When I say the epiphysis proper as being one part and the tubercle being another, that is the way two different parts are usually spoken of?

A. Upon the epiphysis is the tubercle, they all combine as the epiphysis.

Q. What I mean is, if medical men were speaking of the fracture of the epiphysis he would speak,



(Testimony of V. E. M. Osorio.)

would he not, of that portion of the epiphysis which is above the line A-C, and would speak as if he were speaking of a fracture? If he means a fracture of that portion of the epiphysis it would be called a fracture of the tubercle, or separation of the epiphysis of the tubercle—the separation of the epiphysis of the tubercle? A. Yes.

Q. If he were speaking of the fracture of the main portion from A to C, that would be a fracture of the epiphysis?

A. If he wanted to localize and speak of an injury, or separation of the tubercle, it is either a fracture of the tubercle or separation of the tubercle. [222—83]

Q. A medical man if he were speaking of a fracture or separation of the epiphysis would mean a fracture of the main portion of the epiphysis, whereas if he were speaking of the fracture of the tubercle, he would say a separation of the epiphysis of the tubercle?

A. We don't usually separate the epiphysis.

Q. And the injury which you claim which you found in this case was a separation of the tubercular end of the epiphysis? A. Yes.

Q. And you have testified, Doctor, that you have never seen a case of a fracture of the epiphysis, using the term as we have agreed upon, the upper portion of the epiphysis as distinguished from the upper end of the tibia end? A. No, I have not.

Q. There is a distinction is there not between a



(Testimony of V. E. M. Osorio.)

fracture of the tubercle and a separation of the epiphysis of the tubercle? A. Yes, very much.

Q. And what you found in this case was a separation of the epiphysis of the tubercle? A. Yes.

Q. And not a fracture? A. Not a fracture.

Q. Normally, Doctor, that tubercle or projection extends downward and almost parallel with the shaft of the bone? A. Yes.

Q. And by shaft you mean the main bone below the epiphyseal line? A. Yes. [223—84]

Q. And this tubercle is separated from the shaft by cartilage until about the 20th to 25th year?

A. Yes.

Q. Up to that age the cartilage is gradually becoming bone, is it not? A. Yes.

Q. And as it in that gradual way becomes bone, the epiphyseal line grows smaller and smaller?

A. Yes.

Q. And it was an injury such as you claim the plates in this case of the girl's left knee show that you were speaking of yesterday, when you said that such an injury heals from three to five weeks?

A. We expect it to heal.

Q. And it is agreed among medical men that it usually heals about that time?

A. It does not. Medical men do not claim that. We expect it to heal in three to five weeks, if it does heal.

Q. What do you mean, Doctor, by the expression you expect it to heal?

A. Well, we expect it to because we figure it to

(Testimony of V. E. M. Osorio.)

be about the same formation as bone; bone takes three to five weeks to heal, we give it the same time to heal.

Q. Have you any authority for that statement?

A. Sajous; Cunningham; Rose and Carton and De Costa.

Q. Have you any of those authorities here?

A. I have Sajous, De Costa, Cunningham, Rose and Carton.

Q. Will you produce those, Doctor?

A. I will have to go home and get them.

Judge STANLEY.—I ask that witness be instructed to go [224—85] home and get them, your Honor.

Judge THOMPSON.—I will take that under advisement; that is intended as a motion; “that witness be instructed to produce them.”

Judge STANLEY.—I now make a motion, if the Court please, that the witness be instructed to produce in court the books of the authors whom he has mentioned so that counsel may have an opportunity of cross-examining the witness on the subject in question.

Judge THOMPSON.—The Court denies the motion.

Judge STANLEY.—I note an exception.

Q. (Judge THOMPSON to Witness.) Are those books counsel called for at his disposal?

A. I can bring them. I have some at the house and some at the office, if at any time he wants to see them.

(Testimony of V. E. M. Osorio.)

Judge STANLEY.—Do I understand that your Honor refuses me permission to have those books produced by the witness, while the witness is on the stand?

Judge THOMPSON.—I have overruled the motion.

Judge STANLEY.—I make this motion if the Court please: I renew my motion, stating as a grounds therefor, that I wish at this time, while the witness is on the stand, to have him read the extracts from those books or refer to the extracts from those books, which cite as authorities for his statements that the injury known as a separation of the epiphysis of the tubercle does not usually heal until the tubercle becomes bone and is united to the shaft of the leg or tibia until from the twentieth to the twenty-fifth year.

Judge THOMPSON.—The Court overrules the motion without comment.

Judge STANLEY.—I note an exception. [225—86]

Mr. RUSSELL.—I am willing to note on the records that counsel may recall the witness if he wants him at any time and ask him what he wishes.

(Continuation of Examination of Witness by Judge STANLEY.)

Q. Now, I will ask you, Doctor, to mark on the print “F” the location of the injury which you say is shown?

A. I would like to have the plate. (Plate “D” handed witness.)

(Testimony of V. E. M. Osorio.)

A. The anterior, posterior does not show the separation.

Q. Have I by mistake handed you the posterior and anterior view? A. You have.

Q. I hand you exhibit "G" and ask if that shows the side view of the leg? A. Yes; yes, sir.

Q. And a print of the plate which was taken on March 4th?

A. Yes, sir. (Witness marks with an arrow the location of the injury.)

Q. You have testified, Doctor, with regard to the plate from which this print exhibit "G" was taken that the print showed that the injury had healed slightly? A. Yes.

Q. Now, Doctor, have you ever had in your practice a case other than this one of the separation of the tubercle end of the epiphysis? A. Yes, sir.

Q. When.

A. In Cleveland, Ohio, 1918, 1917, hospital work. [226—87]

Q. You testified yesterday, Doctor, that the print marked exhibit "C" which was taken from X-ray plate which you had made on September 4th, showed a separation of about one-eighth of an inch? A. Yes.

Q. Do you mean an abnormal separation of one-eighth inch?

A. Almost; yes; almost one-eighth inch.

Q. One-eighth inch more than normal?

A. Yes.



(Testimony of V. E. M. Osorio.)

Q. Will you tell us, Doctor, how you arrived at that opinion?

A. Through past experience of what I have seen and of those conditions, and from the normal leg; X-ray leg we have.

Q. Do you mean that there is such a thing as a normal or standard separation?

A. It is not a separation, it is cartilage.

Q. Do you mean that there is a normal or standard width of cartilage with which you can make a comparison?

A. We have a certain standard; we always figure a certain amount of separation; a certain amount be normal and a certain amount be abnormal.

Q. When you say we figure certain amount normal and a certain amount abnormal, to whom are you referring?

A. Why I am referring to what I have seen in the hospital practice in Cleveland.

Q. And how many cases, Doctor, of this separation of the tubercle end of the epiphysis have you seen in the five years you have qualified?

A. Quite a few, I don't know how many, usually had with school children in Cleveland.

Q. Quite a few, give the jury some idea?

A. Maybe twenty to thirty. [227—88]

Q. When you say we figure on a certain width of cartilage being normal who do you mean by we?

A. Being connected with the hospital, I was not alone at the hospital, the internes all had access



(Testimony of V. E. M. Osorio.)

not only one but four or five; the head surgeon went over the views with me.

Q. Is there any medical writer that speaks of the width of the normal cartilage at the point which you refer to?

A. No writer speaks of normal separation.

Q. No writer gives, makes any mention, does he, as being the normal width of the cartilage separating the tubercle end of the epiphysis from the shaft? A. No.

Q. So that your only standard, by which you can compare the width of the cartilage shown in Plate "B" with the normal width, is what you have seen yourselves?

A. Yes, with the other men, no.

Q. None of whom are here? A. No.

Q. And the plates to which you refer are all away from the Territory? A. Yes.

Q. Is it not a fact, Doctor, that this width of cartilage is so variable even in persons of the same age that no standard has ever been established, or has ever been mentioned, in any of the works of any medical writer?

A. No, unless both legs are taken, then you can find out.

Q. In other words you mean that the variation in the [228—89] width of cartilage at the point we are discussing, is so variable even between persons of the same age that the only way in which one can be sure that there is an abnormal width is to have a picture taken of both legs?

(Testimony of V. E. M. Osorio.)

A. Yes, it is necessary.

Q. And, Doctor, is it not a fact that when you told us that the plates to which were referred to as exhibit "B" showed an abnormal condition of cartilages, being one-eighth inch wider than the normal, you had not seen plates of the right leg of the plaintiff? A. I had not.

Q. Now, is it not a fact that you were undertaking to state from a picture of one leg, that there was an abnormal width of separation?

A. I wish to state that from a sense of touch we can feel that there is a separation.

Q. Touching what?

A. Touching the separation, to see if there was any fracture?

Q. There was no fracture there? A. No.

Q. What could you gain by touching?

A. We would have felt a little elevation to the touch, which could not be felt in the other knee.

Q. Who do you mean we? A. I mean I.

Q. Did you not tell us yesterday, the only indication you found on which you based your diagnosis, were pain and swelling?

A. Yes, at the time of the swelling.

Q. Did you tell us that that was the only indication [229—90] you found at the time you took the picture? Did you not tell us that they were the only indications you found at any time?

A. I don't remember that they were the only indications I found.

Q. On the date you took the picture?

(Testimony of V. E. M. Osorio.)

A. On the date I took the picture I found swelling and pain. I continued to feel to find if anything was wrong with the leg.

Q. Under examination yesterday, is it not true you did not mention that you found anything from the touch? A. The way the question was put.

Q. You deny that the symptoms mentioned, were the only symptoms you found?

A. I do not know the question.

Q. Now, you say you had something else to guide you to find out the abnormal width, that was the sense of touch? A. Yes.

Q. Do you claim now that by putting your finger on the seat or side of the alleged injury that you were able to say that there was an abnormal separation of the cartilage?

A. Able to say there was something there, as it was entirely different from the right leg. Slight elevation there, which upon pressure was more sensitive than the right leg.

Q. Elevation of what, Doctor?

A. Elevation of separation.

Q. How were you able by that sense of touch to say that there was one-eighth inch difference of that cartilage in the separation from the leg that was uninjured?

A. From what I had studied. [230—91]

Q. This separation varies so much even in children of the same age and people of the same age, whether there is nothing abnormal, until you get a

(Testimony of V. E. M. Osorio.)

picture of both legs of the person of the same age, how do you reconcile those statements?

A. When I took that picture and what I found with the sense of touch, showed me that there was a certain amount of separation more than the other?

Q. And that amount was one-eighth of an inch?

A. After I saw the picture.

Q. Will you explain to the jury the picture of one leg, you were able to say that the separation was one-eighth of an inch more than the separation of the cartilage of the leg, of which you had no picture?

A. (Witness shows picture and explains.) This will show you at least here nearly separation of about one-quarter inch, and just above shows you separation of about less than one-eighth of an inch and should be normal separation all the way through.

Q. Will you indicate, if you please, on the print, the place on print "C," the place where you found the separation is about one-quarter of an inch and the place where separation is one-eighth of an inch?

A. Very indistinct.

Q. Will you attempt to mark, will you please do it, Doctor, across that line so as not to interfere?

A. (Marking.) The line marked "G" indicates the place where separation is one-eighth of an inch.

Q. Now, will you indicate by line, where the separation is one-quarter of an inch?

(Witness so marks on print.) [231—92]



(Testimony of V. E. M. Osorio.)

Q. Is it not a fact, Doctor, that the line which you have marked one-quarter inch, is below the end of the tubercle?

A. No, not in this picture. Maybe in the other; it is the best I could do there; the picture is very indistinct.

Q. Is it not below the tubercle?

A. I don't think so, about normal.

Q. Now, do I understand you, Doctor, that at the point which is marked with the line "D," the cartilage is, in your opinion, of normal width?

A. Yes, line "D."

Q. And that the place where the width is abnormal is between the line "G" and the point on the shaft which you have marked with the line and character  $\frac{1}{4}$ "? A. Yes.

Q. So then, Doctor, as I understand you, the space between the point marked with the line "D" and the letter "A" is normal, and it is the place below the point to the line "D" which is abnormal?

A. Naturally as the separation—it will be a little abnormal; it will also have a tendency to make the separation a little wide than usual.

Q. But have you not told us, Doctor, that the point which you have marked with the "D" is normal, is of the width of an  $\frac{1}{8}$ " and is normal?

A. This width normal "D" should be down here and it is not in the normal direction; it should be down here where this separation is.

Q. Now, then, do I understand now, Doctor, that



(Testimony of V. E. M. Osorio.)

you say that at the point which you have marked with the line "D" is not normal?

A. You asked me in a previous question to mark what [232—93] would be normal; I marked not as reference with the bone, but reference to the normal width, the way you wanted it.

Q. Will you so mark this, Doctor, where the abnormal width is, where it begins?

(Witness so marks.)

Q. You have now marked a place with a line, at the end of which is the letter capital "E." So that is the place where you say where the abnormality begins? A. Yes.

Q. So that, Doctor, the portion of the epiphyseal line shown between the lines marked "E" and the point marked "A" on the print is normal?

A. Almost normal. I could not mark every 1/100 of an inch.

Q. It is normal to within 1/100 of an inch?

A. Yes.

Q. You told us yesterday from A on to C is normal? A. Yes.

(Showing of print to the jury by Judge Stanley.)

Q. I hand you, Doctor, Plaintiff's Exhibit "I" and ask you to mark on that print the place where the abnormality begins?

A. (Witness so marks.)

Q. The curved line indicates the place where the tubercle is separated from the bone, causing separation there?

(Testimony of V. E. M. Osorio.)

A. The line has to be in a curve to cover the area, from A-B to, and B-G.

Q. Then do I understand that the line A-B and B-G indicates what would be the normal epiphyseal line? A. Yes. [233—94]

Q. And while you are about it will you mark the rest of the epiphyseal line?

A. (Witness so marks.) As far as I can see it.

Q. I know you don't, Doctor, intend a gap between this letter "A" and the line on which is marked "B"?

A. I cannot see the line any further.

Q. But you claim that the epiphyseal in that place should be shown, would run in two different directions?

A. On account of the curvature of the knee. It does not run—this is due to the separation, then the line would continue downward and this part being out, leaves that separation there.

Judge THOMPSON (to Judge STANLEY).—Does this plate purport to be the last one taken?

A. (By Judge STANLEY.)<sup>1</sup> Yes, your Honor.

(Continuation of Examination of witness by Judge STANLEY.)

Q. I will ask you, Doctor, whether or not, as I have mislaid a duplicate of print 1014, print 1015, does not show another picture of the same leg taken at the same time in the same approximate position?

Judge THOMPSON (to Witness).—Need not answer for the reason that you are testifying concerning a plate that has not been exhibited in the Court.

(Testimony of V. E. M. Osorio.)

Judge STANLEY.—Will counsel admit that this print, which I now hand counsel, in truth and in fact, is a similar print, a copy of the print, with the same number 1015 which has been admitted in evidence in this case?

Mr. RUSSELL.—We admit that.

Judge THOMPSON.—Need not answer that, Doctor.

Judge STANLEY.—Does your Honor refuse to allow me—

Judge THOMPSON.—I similarly rule on the question. [234—95]

Judge STANLEY.—I will withdraw the question, and now on the admission of counsel I offer a duplicate of print 1015 which has heretofore been introduced in evidence as Plaintiff's Exhibit "J."

Mr. RUSSELL.—That is object to, as being immaterial and irrelevant.

Judge STANLEY.—I may have to mark the original throughout. I may have to mark the print 1015 which has been offered in evidence in a way which will interfere with the marking which I wish to make; this is another print of the same picture with the same number.

Judge THOMPSON.—Is that all the statement you want to make.

Judge STANLEY.—Yes.

Judge THOMPSON.—The Court rules that it cannot be admitted.

Judge STANLEY.—I note an exception.

(Testimony of V. E. M. Osorio.)

(Continuation of Examination by Judge STANLEY.)

Q. I hand you, Doctor, Plaintiff's Exhibit "J" and ask you to mark, if you will on that print, the epiphyseal line as you say it would run, if normal.

(Witness so marks on print.)

Judge THOMPSON.—Does that purport to be the right or left knee?

Judge STANLEY.—1014 and 1015 are the left knee.

Q. You have drawn two lines, Doctor, one marked A and another marked B, do I understand you that the line which commences at letter "A," and runs over till it meets line marked "B" shows the correct line?

A. Where they both meet as far as I can see of the cartilage. [235—96]

Q. Will you mark above that— Now, I understand, Doctor, the point from C to B is normal and that any abnormality there would begin at the point "C"?

A. I cannot see the rest of the cartilage, so I am not going to mark a thing that I can't see.

Q. Will you mark what, in your best judgment, would be the normal line of the epiphysis from the point C to its extremity?

A. It should run from C to there (indicating).

Q. May I ask you, Doctor, if in the prints 1014 and 1015, you see an improvement in the condition of the injury from what you judge to be the im-



(Testimony of V. E. M. Osorio.)

provement in the leg as shown by the plate which was taken on September 4th?

A. Shows a slight improvement.

Q. To what extent, Doctor?

A. Well, the separation does not seem so great as it was in the other picture, first picture.

Q. An abnormal width being in the first picture, about  $\frac{1}{8}$ ", can you tell us now what, at the date when these pictures 1014 and 1015 were taken, the separation from the normal is?

A. I would like to see the pictures, 1014 and 1015, and the first picture taken. The separation below remains about the same, but above it shows a little.

Q. At the lower end of the tubercle the separation seems to be about the same? A. Yes.

Q. In this direction the separation is less?

A. Yes.

Q. And that is sure indication, is it not, Doctor, that the injury that you complained of, is healing? [236—97]

A. I don't say that it was healing; I don't know whether it would continue.

Q. Does a comparison of the picture "B" with 1014 and 1015 show in your judgment that the injury is healing?

A. It shows the healing at the present time.

Q. 1014 and 1015 were taken on the afternoon of May 23, this year? A. Yes.

Q. Then the pictures show, Doctor, do they not, 1014 and 1015, as compared with picture B, which was taken on September 4th, that the injury you



(Testimony of V. E. M. Osorio.)

claim exists in the Plaintiff's leg had been healing and has healed to some extent?

A. To the present time.

Q. And your comparison of picture "B" with a picture which was taken on March 4th, show that the wound had healed to some extent between those dates? A. Yes, sir.

Q. I ask you, Doctor, if you could tell now from the examination of the plates which were taken on May 23d, how much the abnormal separation amounts to? Comparing it with first picture you said on September 4th,  $\frac{1}{8}$ " abnormality; now the other picture shows, the picture taken on March 4th shows an improvement and the picture taken on May 23d shows improvement, and I asked you what is the abnormality of separation or what are the abnormalities of separation on May 23d?

A. I will have to see the pictures. (Asks for pictures of May 23d.) This is March and September.

The separation in the upper part between the tuberosity and the bone, is decreased, and at the lower part, it was about the same. The examination shows about the same. [237—98]

Q. To what extent did the separation decrease at the upper end?

A. I cannot say just exactly as indicated in the picture.

Q. Now, you were able to tell us, you told the jury that by merely touching you could ascertain that there was an eighth of an inch abnormality on Sep-

(Testimony of V. E. M. Osorio.)

tember 4th. Can you not tell us *us* now when you got this impression?

A. I am telling you what the separation below is. The upper part I did not have. It was the lower part.

Q. Then will you tell us from your sense of touch what was the abnormality in the upper part?

A. I did not try to ascertain that. The lower part where I could feel it.

Q. Now, Doctor, I understand from your testimony is that your first determination of this condition, you found, was to bandage the injured leg with adhesive plaster? A. Yes, sir.

Q. And above and below the knee? A. Yes.

Q. This bandage being tight? A. Yes, sir.

Q. And other than that you used no mechanical appliance at first? A. No, sir.

Q. To keep the leg immobile?

A. We kept it immobile by having pillows on each side *side* of the leg so that the child would not have mobility.

Q. You did not mention that yesterday?

A. That is included in the treatment; we mentioned rest.

Q. Was it in accordance with your instructions that plaintiff was allowed, during the time when she was supposed to be confined to bed, to walk around the house for purposes [238—99] of nature, or for the purpose of getting a drink?

A. They lifted her up and not to walk around.

Q. I am asking you if it was contemplated in

(Testimony of V. E. M. Osorio.)

your treatment that the patient should walk around the house during the time when she was supposed to be laid up?     A. No.

Q. And you continued with this treatment, adhesive plaster bandage, up to about two or three months ago?     A. Yes.

Q. And after the first three weeks the plaintiff was allowed to walk around her house, and yard, and to attend school and walk around the school premises?     A. To walk on the school premises.

Q. So that between the time that school opened early in September, 1920, up to the time when you secured the rubber bandage for her, she was allowed to walk and move about?

A. In school; not anywhere she wanted to go.

Q. And to walk around the house and around the premises on which her house is situated?

A. Yes.

Q. And I will ask you, Doctor, if you expected with or could expect, with that treatment that the injured leg would speedily recover?

A. I do. Not speedily, but slowly.

Q. Is it not a fact, Doctor, that the mere allowing of her to walk around, merely with the adhesive plaster bandage on until the tubercle had come back to its normal position, would retard the recovery?

A. Not necessarily.

Q. Would it ordinarily?     A. No. [239—100]

Q. Would it under any circumstances?

A. No.

(Testimony of V. E. M. Osorio.)

Q. Then what do you mean by saying, not necessarily?

A. For this reason that after separation shows no complete healing at the end of three to four weeks, it is unnecessary to keep the patient in bed for recovery you will not get within that time, it will not surely develop at the end of nine months.

Q. Doctor, if without keeping the girl in bed you had kept her at home and given the leg as much rest as possible would you not expect the recovery to be quicker than in the case of allowing her to walk around? A. I do not.

Q. Have you any authority, Doctor, to which you can refer, except your own, to the effect that if the injury is not healed within three or four weeks, it is not necessary and will serve no purpose to keep the injured part immobile?

A. I will mention De Costa.

Q. Have you De Costa with you.

A. I have it over at the house.

Q. And when you refer to De Costa, a surgical work published by De Costa, he is supposed to be a surgeon in Jefferson University? A. Yes.

Q. And if you had De Costa could you refer us to the passage in that work to which you are using in support of your statement? A. Yes, sir.

Q. (Judge STANLEY.) If the Court please, I now renew my motion that the witness do procure the book to which he has referred, that I may be able. [240—101]



(Testimony of V. E. M. Osorio.)

Judge THOMPSON.—The Court overrules the motion, for the reason that the Court allowed this witness to be questioned and even cross-questioned on his ability as a surgeon, in attempting to disqualify or qualify his statements.

Judge STANLEY.—I note an exception.

Q. When you secured the rubber band and had the plaintiff substitute it for the adhesive plaster bandage, you continued to take no other measures to keep the injured part immobile?

A. Prior to have the rubber band?

Q. After securing the rubber band and substituting it for the plaster?     A. No.

Q. And still allowed the child to walk around her house premises and attend school and walk around the school premises?     A. Yes.

Q. And both the adhesive plaster bandage and the rubber band allowed the plaintiff to flex and extend the leg?

A. The rubber bandage does, the adhesive not so much as far as flexion is concerned.

Q. They both allowed the leg to be extended to about the same degree?     A. Yes.

Q. And they both allowed the plaintiff to flex or bend the knee, but the rubber band allowed that flexion to a greater degree than the adhesive plaster bandage?     A. Yes.

Q. Now, Doctor, what is the chief muscle or muscles which is used in extending the leg?

A. That is the quadriceps femoris. [241—102]

Q. And that is a large powerful muscle?



(Testimony of V. E. M. Osorio.)

A. Yes, sir.

Q. Of the thigh? A. Yes, sir.

Q. And it is really composed, four muscles?

A. Yes.

Q. Which terminates into a tendon? A. Yes.

Q. And at what point in the leg below the knee is that attached?

A. To the tuberosity of the bone by means of the patella ligamentum.

Q. This tendon is known as the patella ligamentum? A. Yes, sir.

Q. And that you say was attached in the plaintiff's case to the portion of her leg which was injured? A. Yes.

Q. Is it not a fact that every time she extended her leg that tendon was pulling on the injured part?

A. We expected that by due counter-irritation to have a certain amount of bone tissue to heal it. With that protection she had on, it prevented a complete usage of that muscle that controls that ligament.

Q. I am not asking you about the complete usage of that muscle. That every time she extended her leg that there was a pulling of her leg?

A. There is a certain amount.

Q. And, Doctor, is that not the fact even when one, owing to the fact of having a bandage on, or tries to walk stiff legged? A. Yes.

Q. Is it not a fact the more the stiff-legged the condition, the greater the tension on the injured part? A. *Well*— [242—103]

(Testimony of V. E. M. Osorio.)

A. Well, there is more tension, yes, on the injured part.

Q. In other words, Doctor, with a stiff leg, made stiff by a bandage, there is greater pulling on the injured part?

A. But the bandage prevents the muscles from moving freely.

Q. You mean the bandage prevents the full force of the muscle being felt on the injured part?

A. Yes.

Q. But allows it to have a certain amount?

A. Yes.

Q. Would it heal quicker with the bandage, or without? A. It would.

Q. What do you mean by that answer?

A. What is meant, it prevents the muscle from performing its natural function, gives a chance for the injury to improve.

Q. By reason of the fact that the bandage preventing this powerful muscle to perform all of its force? A. With all its force.

Q. You don't mean to say, Doctor, that she would get well quicker by being allowed to walk and moving, and having some of the force felt on that muscle, than she would if she had not been allowed to walk?

Judge THOMPSON.—That has been answered three or four times.

Judge STANLEY.—I note an exception.

Judge THOMPSON.—I warn you again you must proceed more rapidly than you have.

(Testimony of V. E. M. Osorio.)

Judge STANLEY.—I have not been speaking more rapidly on account—

Judge THOMPSON.—No use making any more arguments. You know what I mean by it, within the meaning of the Court's orders. [243—104]

Judge STANLEY.—I note an exception.

Q. Now, Doctor, the object a doctor has in view in treating an injury such as you prescribe in the plaintiff's case is to prevent further separation of the tubercle, is it not?     A. Yes.

Q. And to allow the tubercle to get back to its former place?     A. Yes.

Q. And is it not a fact, Doctor, that every time that the plaintiff extended her leg the action of the quadriceps tendon tends to enlarge that separation and prevent—

Mr. RUSSELL.—I object to that question as it has already been answered.

Judge THOMPSON.—The Court sustains the objection.

Judge STANLEY.—Note an exception.

Q. I will ask you, Doctor, is it not a fact that if you want to guard against any further separation and allow the tubercle to resume its normal position and to allow the patient to recover naturally, you must prevent in some way all action of the muscles on the injured part?

Judge THOMPSON.—Need not answer that.

Judge STANLEY.—Your Honor refused to allow the question? I note an exception.

(Testimony of V. E. M. Osorio.)

Q. I will ask you, Doctor, if it is not recognized by leading medical and surgical authorities that the proper way to keep the leg in such a position that the muscle, quadriceps femoris, will not act on the injured part is to keep the leg, by the use of splints or by a plaster of paris cast, or other cast, immobile up to a certain period.

A. Yes, up to a certain period.

Q. Up to what period? [244—105]

A. Three to four weeks; as high as five weeks.

Q. Do you mean, Doctor, that irrespective of the condition in which the injury may be at the end of three or four weeks, medical authorities and surgeons, discontinue to use splints or casts?

A. In what cases, may I ask?

Q. In cases of injuries of the nature you say the plaintiff had?

A. Up to three or five weeks they do.

Q. Is it not a fact, Doctor, that the leg should not to be taken out of the splints or cast until the bone has healed or is rapidly healing?

A. No, sir.

Judge THOMPSON.—In his evidence there was no mention made of splints having been used, and the Court will ask that you direct your examination on different lines.

Judge STANLEY.—Is it your Honor's ruling that I will not be allowed to examine the witness on the proper practice to be followed in attempting to heal an injury of that kind that the doctor said



(Testimony of V. E. M. Osorio.)

the patient is suffering from. May I ask your Honor to—

Judge THOMPSON.—Judge Stanley, I am not undertaking your case.

Q. I will ask you, Doctor, if, considering your testimony that you knew the nature of the injury to the tubercle both before and after the taking of the X-ray picture of September 4th, the surest and safest method of securing a rapid and complete recovery of the injured portion, would not it be to adopt the use of a splint or cast continually? A. Not necessarily. [245—106]

Q. Will you explain what you mean, not necessarily?

A. In this case, as long as we can place the limb in an immobile position by placing obstructions on either side and having the leg properly bandaged tightly by not having a plaster cast or splints.

Q. Do I understand that if you find at the end of three or four weeks the leg not healed that you can discard this splint or cast?

Judge THOMPSON.—You need not answer that.

Judge STANLEY.—I note an exception, and instructing the witness he is under no necessity to answer the question.

Q. Is it your opinion that if you find at the end of three or four weeks the leg does not heal that you can discard the splints or cast?

Mr. RUSSELL.—I object to the question.

Judge THOMPSON.—Objection sustained.

Judge STANLEY.—I note an exception.



(Testimony of V. E. M. Osorio.)

Q. Do you mean, Doctor, that if the injury has not healed at the end of three or four weeks it would be useless to continue to keep the leg in splints for any further time?

Mr. RUSSELL.—We object to the cross-examination; we have purposely avoided objecting in order that it would not seem as if we were trying to keeping something away, and I think it should be limited. We object upon the ground that defendant has been<sup>e</sup> permitted considerable latitude in the cross-examination of the witness upon the subject-matter embodied in this particular question, and to permit further cross-examination upon this question would be—

Judge THOMPSON.—Objection sustained.

Judge STANLEY.—Note an exception. [246—107]

Q. You stated, Doctor, I think, that the allowing of the plaintiff to extend the, to walk about and extend her injured limb would not delay recovery because you expected by counter-irritation some bone tissue; please explain what you meant.

Judge THOMPSON.—You need not answer the question.

Judge STANLEY.—I note an exception.

Q. Now, Doctor, you have testified that the bandages that you put on or had the plaintiff use were tight? A. Yes.

Q. I will ask you if it is not a fact that the rubber band that she is wearing under your directions is

(Testimony of V. E. M. Osorio.)

not so tight as to make rills or red ridges on the leg?     A. Yes.

Q. I ask you if the presence of those red ridges do not indicate that there is an impeding of the flow of blood?

A. It may be tight, at the upper and lower end, and still loose enough for circulation.

Q. Does the presence of those ridges indicate interference of the flow of blood?

A. With the superficial circulation.

Q. Now, you have testified, Doctor, on direct examination that the plaintiff was suffering from time to time from a swelling of the leg; will you tell us on what parts of the injured leg those swellings occurred, or appeared?

A. In the first part of the swelling it was usually over the joint and since she wore the rubber band, why it kind of extends below the joint and there is a certain amount of swelling in the joint itself.

Q. Is there any indication on the plates of any swelling in the joints?

A. No, not on the plates. [247—108]

Q. If there was any infection it would cause swelling?     A. No tissues are shown.

Q. If there was any infection would that appear on the plates?

A. Not in the way X-ray is taken. Soft tissues are not taken in X-rays.

Q. I had not been asking about tissues and the doctor has been interpolating same. It does not

(Testimony of V. E. M. Osorio.)

show in the plates? Infection would not show in the plates? A. No.

Q. That in order to have infection you would have to have the plates specially prepared?

A. You would have to have an extension of time in taking the picture.

Q. Do you claim that there is any condition of infection in the plaintiff's knee?

A. A certain amount of swelling, yes.

Q. Caused by what, Doctor?

A. Due to the injury she has there, partially.

Q. In what way, Doctor, caused by the injury?

A. Well, in moving the limb that she has to.

Q. When you said partially did you mean that there was some reason to account for the other part?

A. Why, yes, on account of the pressure of the bandage of the rubber band.

Q. So that, as I understand you now, any swelling that is around there, is caused either by—so that in your opinion any swelling that is present around the knee now is caused in part by the rubber band and in part by the movement of the knee, which she has to make? A. Yes. [248—109]

Q. And when you say movement which she has to make, what do you refer to?

A. To carry on her daily life.

Q. Now, Doctor, having disposed of the swelling of the knee, I will ask you, where else in the leg below the knee have these swellings occurred?

(Testimony of V. E. M. Osorio.)

A. Right below the rubber band.

Q. You mean around the calves?      A. Yes.

Q. Any swelling at the ankles?

A. I did not notice; have not noticed any.

Q. Do you mean did not notice any at any time?

A. Yes.

Q. Now, Doctor, to what in your opinion is that swelling in the neighborhood of the calves of plaintiff due to?

A. Due to pressure of the bandage.

Q. That is, and correct me if I am wrong, Doctor, it is due to the free circulation of the blood being impeded by the bandage?      A. Yes.

Q. And that is the only cause, Doctor, to which you attribute the swelling in the neighborhood of the calf?      A. Yes.

Q. Doctor, you told Mr. Russell that the plaintiff would be liable to suffer pain at the seat of the injury, that you claim, namely, the tubercle, and that pain would be intermittent. What do you mean by that?      A. Off and on.

Q. Occasioned by what, Doctor?

A. Due to the use of her leg; on account of the separation being there, she uses the leg a little, why one day she may have pain, next day may be absent altogether, [249—110] the day following may be there again.

Q. And that pain, Doctor, is caused, is it not, by the pulling of the large muscle of the thigh on the injured part?



(Testimony of V. E. M. Osorio.)

A. Due mostly to that and the use of the injured leg.

Q. It is not due to the action of the muscles when she is walking? A. Partially, yes.

Q. The action of the muscle, I mean the action of the muscles on the injured part? A. Yes.

Q. Is it due to any other cause?

A. Well, it may be due to the—I said due partially to the movement, and partially, well, may be due to the joints because when you move that, the joint is in motion would have some tendency.

Q. It is due to either the pulling of the quadriceps femoris on the injured part or due to other muscles which act on the injured part when she uses the leg in walking? A. Yes.

Q. And is it due to any other cause besides the separation which exists there?

Q. Will you explain how, if she was walking she would have the pain which you describe is caused by the pulling of the muscle on this tubercle?

Judge THOMPSON.—You need not answer that.

Judge STANLEY.—I note an exception to the refusal of his Honor to allow the question.

Q. You testified yesterday, Doctor, did you not, that the plaintiff would not recover from the injury until from the twentieth to twenty-fifth year, and also testified that the cure would not be complete at that time?

A. I said, may not be complete. [250—111]

Q. What would in your opinion prevent the cure being complete at that time?



(Testimony of V. E. M. Osorio.)

A. The injury being so long up to that time may cause a certain amount of deformity there, which we cannot—

Q. Deformity to what, Doctor?

A. The tuberosity.

Q. Do you mean deformity caused by the pulling of the muscle on that muscle?     A. I do not know.

Q. What do you mean?

A. I mean the growth not growing properly as it should as we know; all fractures do not grow the same, just as we expect them to, nature takes care—

Q. Are you giving this as your opinion as to the probable condition in this case; of the injury in this case?     A. It may be often that way.

Q. You understand the use of the word probably and may?     A. Yes.

Q. Are you giving this as your opinion as to the probable result of the injury to the plaintiff?

A. I say it may probably, I cannot say what would happen ten years from now, impossible for anyone to predict anything to happen to a joint ten or twelve years from now.

Q. Then you are merely expressing an opinion as to what under the most adverse circumstances might possibly happen?

A. As far as the deformity of the tubercle.

Q. And by deformity you merely mean, do you, difference in shape from the normal?

A. Something that may prevent her from having the proper usage of that leg.

(Testimony of V. E. M. Osorio.)

Q. Is it not a fact that the continuous use of that [251—112] leg now with the quadriceps extension working on the injury is a—prevents its recovery until it is given a chance to rest?

A. Not the way it is being treated at the present.

Q. So you claim that the way it is being treated at present, the plaintiff being allowed to walk on it and to use the muscle on the injured part—

Judge THOMPSON.—You need not answer that.

Judge STANLEY.—Exception noted.

Q. I will ask you, Doctor, the Court having, and I say this respectfully, having curtailed my right, as his Honor thought proper, to examine you further on the question of treatment of an injury such as you say exists here, by the use of splints and casts, if it is not a fact that according to the most modern notions of surgery, that instead of using a splint or cast, which is still recognized as proper, that some appliance is used which will prevent the play of the muscle on the injured part?

Mr. RUSSELL.—That is objected to.

Judge THOMPSON.—I want the record to show that I have not curtailed any witness, and the remarks made by the attorney were highly improper. Objection sustained.

Judge STANLEY.—I note an exception. I have never been disrespectful to any Court in my twenty-five years of practice.

Judge THOMPSON.—It is all past now.

Q. I will ask you if leaving aside the question of the use of splints or casts, it is not recognized

(Testimony of V. E. M. Osorio.)

by medical authorities as correct practice to keep the muscles which affect a pull upon, from acting upon that part when it is injured?

A. That was done by me through the adhesive plaster, and the rubber band. [252—113]

Q. Have you not told us, Doctor, that the adhesive bandage and the rubber bandage still allows the action on the injured part?

A. Partial.

Q. I will ask you again if it is not a fact that according to modern surgery it is considered necessary to keep the muscles which play upon a part from acting upon that part, when it is injured?

A. No, sir.

Q. Is it not a fact, Doctor, that an injured leg, has up to date, and was during the time of your service in the expeditionary forces, kept in a sling or hammock so that the muscles affecting the injured part would not play upon it?

Judge THOMPSON.—You need not answer that question.

Q. (By Judge THOMPSON.) Doctor, have you given this girl such treatment as your experience, your ability, and medical science would dictate, under all circumstances? A. I have.

Judge STANLEY.—I note an exception to the question of the Court, on the ground that it does not call for the standard of treatment which the law requires, and that the witness can describe a treatment or give his conclusions.

Judge THOMPSON.—Proceed.

(Testimony of V. E. M. Osorio.)

Judge STANLEY.—I offer to examine the witness further along the lines last touched on, by me, to the effect and to elicit from him if I can, that, in accordance with modern surgery, an injured part is hung in a hammock or some other contrivance which has the same effect as a splint or cast would have, that is of keeping the muscles controlling or acting continually on a part, from acting on that part when it is injured, at the same time allowing the part which is not injured free action and motion.

A. We have always done that. That is not a modern [253—114] theory but an old theory.

Q. It has always been the theory of keeping the muscles from acting in certain cases?

A. I do not know what you have reference to. You were talking about the leg.

Q. In what way do I make myself unintelligible? In what case is that done?

A. For instance in fracture cases, we try to get as much mobility as possible.

Q. And how do you effect that object?

A. Well, we have different ways of doing it. We can do it with splints; we can do it with the plaster cast; we can do it with the pillow splint.

Q. And by pillow splints, putting pillows on either side? A. Yes.

Q. You fastened the pillows around the leg?

A. No.

Q. You spoke of the use of pillows in bed?

A. One on each side to prevent motion in bed.



(Testimony of V. E. M. Osorio.)

Q. Would that completely prevent motion in the leg?     A. Most of it.

Q. As long as the pillows were kept in position?

A. Yes.

Judge STANLEY.—I now renew my motion, if the Court please, that the Court instruct the witness to produce the authorities which he enumerated as supporting the position taken by him.

Judge THOMPSON.—The Court overrules the motion.

Judge STANLEY.—I note an exception.

Q. You referred, Doctor, yesterday to a kinky condition which would cause pain? [254—115]

A. Yes.

Q. Will you explain that?

A. I mean that separation there would cause a sort of a spreading which would cause a certain amount of pain.

Q. Do you mean when the plaintiff exercised her leg in walking?

A. In walking or in making certain movements.

Q. By walking or making certain movements of the leg, by which the quadriceps femoris would be acting on the tubercle?     A. Yes.

Redirect Examination of Witness by Mr. RUSSELL.

Q. Doctor, you just stated that the theory of so supporting the injured leg in all cases as to prevent mobility, is an old theory and not new. What is the new theory?



(Testimony of V. E. M. Osorio.)

A. The new theory as is used during the overseas was to have mobility of the joint and to that effect, instead of immobility at the joint. De Page started the theory of mobility of the joint and we used it in our army as well as the French, and we found out that we had very good results.

Q. That pertains to the joints? A. Yes.

Q. And did you follow that practice yourself?

A. Yes, I did, with success. I have a case at the hospital now, pertaining to the leg.

Q. That applies to fractures?

A. Yes. That is the same; we splinted the leg for a certain period, three to four weeks, after than we took the splints off and put on the bandage.  
[255—116]

Q. Who did you say this fellow is?

A. De Page.

Q. Doctor, what would have been the natural results to the plaintiff if she had remained in bed for a period of months, with her leg immobile, not having been used to it?

A. We would have had acute ankylosis. Stiffening of the joint, and there would have been a certain amount of atrophy of the muscles, for instances, for instance the arms and the legs.

Q. And if that had been done there would or not, or would have been that counter-irritation that was advisable?

Judge STANLEY.—I object to the question as the witness has not testified concerning counter-irritation. The witness has not—

(Testimony of V. E. M. Osorio.)

Judge THOMPSON.—Motion overruled.

Judge STANLEY.—I note an exception.

Q. You just mentioned ankylosis might result; stiffening of the joint, due to failure of the usage of the limb; is that a condition that would be permanent depending on the period?

A. You would have complete ankylosis there, for which nothing can be done.

Q. Doctor, yesterday there was a distinction brought out between the separation of the tubercle or the partial separation of the epiphysis and the fracture of the epiphysis, and in that connection you said that there was a distinct difference in medical technical terms. I will ask you whether in the ordinary acceptance of the term even in this proposition, if there is any difference?

A. We always classify separation under fractures in common usage among the doctors, we call it fracture, although it is a separation. [256—117]

Q. (By Judge STANLEY.) Do you mean, Doctor, that fractures is a general term, which may include separations and fractures?

A. Included under that heading.

(Continuation of Redirect Examination by Mr. RUSSELL.)

Q. Doctor, you spoke of practice with a certain firm in Cleveland, as Assistant Surgeon, what is the name of that firm?

A. Corrigan-Makinney Steel Works.

Q. Will you describe this steel works?

(Testimony of V. E. M. Osorio.)

A. Corrigan-Makinney is one of the largest steel firms in Cleveland, employs five or six thousand men, staff doctors, who take care of the employees and have their own hospital.

Q. Takes care of its surgical and medical cases exclusively?

A. No medical. Only surgical.

Q. Doctor, you spoke of authorities mentioning Sajous, Cunningham, De Costa, etc., upon the proposition that if the healing of an injury such as plaintiff has suffered would not be affected from three to five weeks that you cannot expect a recovery until after some years; will ask you as to whether you know that Keene is also an authority upon that? A. Yes, sir.

Q. Have you read Keene in that connection?

A. No, not for quite a while.

Q. Have you looked that up in Keene?

A. I have not. I have Keene's works in more than one volume.

Q. Are there more than one volume?

A. I think eight volumes.

Q. It is a standard authority? A. It is.

Q. Do you recognize this book, showing you Volume II, [257—118] Bones, Fractures, Discoloration, as one of the volumes of the authorities you speak? A. Yes, sir.

Q. That is not your book, is it? A. No, sir.

Q. Will you see if you can find anything? (Hands the witness book in question.)

(Testimony of V. E. M. Osorio.)

Judge THOMPSON.—Cannot do that on re-direct examination.

Judge STANLEY.—You have stated, Doctor, that Keene's works support your statement that if healing is not effected within three or four weeks, you cannot expect a recovery for some years?

A. It was another authority I cited.

Q. You have cited Keene's works on surgery as being an authority for the proposition that if the healing of an injury such as you say plaintiff suffered on August 20th, was not affected within three to four weeks, it would not heal for years; will you please turn to the passage in Keene to which you have reference?

Judge THOMPSON.—Shakes his head (indicating he would not allow the question).

Judge STANLEY.—Your Honor refuses to allow it?

Judge THOMPSON.—Getting beyond the rules of evidence.

Judge STANLEY.—I note an exception.

(Continuation of Redirect Examination by Mr. STANLEY.)

Q. You say, Doctor, that the modern theory in regard to the treatment of fractures is to have mobility of joint, and to have the patient use the leg. Do you mean that according to modern authorities the patient is allowed to exercise the muscles that affect the part while the part is injured? A. Are you referring to the joint?



(Testimony of V. E. M. Osorio.)

Q. I am asking you, Doctor, if according to modern [258—119] authorities the patient is allowed to exercise the joint, if it involves the action by him of the muscles on the affected part?

A. We use mobility. We allow patient to have mobility of that joint.

Q. Is it not a fact that according to modern surgery that the patient, assuming the knee to be fractured, is not allowed to move the leg, but that the joint is manipulated by a doctor or other person in such a way as to prevent the patient exercising the muscle?

A. He has mobility there.

Q. I am asking if the leg is not manipulated by the doctor or other person, nurse?

A. Well, yes, patient cannot handle the leg himself. That is unexpected. The doctor or the nurse, naturally.

Q. The doctor or the nurse moves the joint back and forth, but does not allow the strain on the muscle, or the muscle to move?

A. Not for the first few weeks.

Q. Is it allowed at any time?

A. If there is improvement, it is allowed.

Q. Do you mean that according to modern surgery, that in order to prevent stiffening of the knee by lying in bed patient is allowed to move the joint and increase the injury done to the injured part?

Judge THOMPSON.—You need not answer that.

Q. You have testified, Doctor, that the natural



(Testimony of V. E. M. Osorio.)

result of the plaintiff if she had been allowed to remain in bed, if that leg had been kept immobile for several months, she would have been suffering?

A. Yes.

Q. And after being in bed for several months there [259—120] would have been, may have resulted in permanent stiffening? A. Yes.

Q. Would it have resulted in a permanent stiffening?

A. All depends how much addition there was to the joint.

Q. Addition by what?

A. By mobility of the joint.

Q. Will you tell us that?

A. Naturally, if you are not using your joint, additional motion within the joint, it causes the tissues to grow together and forms a mass there, would cause the joint to be immobile.

Q. That is your professional opinion, to having plaintiff lying in bed for several months would probably cause a permanent injury of that nature, would cause an injury known as permanent ankylosis? A. May cause permanent ankylosis.

Q. It may be slight and it may be great?

A. It may be.

Q. Is it not a fact under the circumstances which you describe that the joints should be manipulated by a doctor or surgeon from time to time to prevent such an injury?

A. When we have immobility, yes.

Q. Could it not have been done in this case, to

(Testimony of V. E. M. Osorio.)

have the patient lie up for several months, take the cast off every couple weeks or so, and have the doctor or nurse manipulate the joint, so that the muscle would not be playing on the injured joint?

Judge THOMPSON.—You need not answer that question.

Q. Would it not have been a proper procedure to have followed?

A. Not necessarily.

Q. What do you mean? [260—121]

A. We did not have a fracture here, of the joint, we are dealing with the tuberosity.

Q. Would it not have been a proper procedure to have the leg immobile so that the quadriceps tendon, or muscle, would not work, and to have had the patient placed at rest for several months, and at intervals during that interval of several months to have had the joint manipulated by a doctor or nurse to prevent ankylosis or atrophy?

A. I did not see any need of that in this case.

Q. It would have been a proper course?

A. Not in this case, not in a separation?

Q. Why?

A. Because I stated that if separation does not heal, there is nothing to do but to leave it alone and let nature take care of it.

Judge STANLEY.—I now move, if the Court please, to strike out all the evidence given by Dr. Osorio to the effect that the authorities named by him supported the proposition advanced by him, on the ground that the defendant has not been al-

(Testimony of Daniel V. Borden.)

lowed to cross-examine the witness on that statement, and to have the books and authority referred to by the Doctor, De Costa, to enable counsel to cross-examine him.

Judge THOMPSON.—The Court overrules the motion.

Judge STANLEY.—Note an exception.

**Testimony of Daniel V. Borden, for Plaintiff.**

Swearing of witness by the Clerk of the Court:

Direct Examination by Mr. RUSSELL.

Q. What is your name?

A. Daniel V. Borden.

Q. You are employed where?

A. First Bank of Hilo.

Q. In the bank as a clerk?

A. As a bookkeeper. [261—122]

Q. Were you employed in that institution last August? A. I was.

Q. Do you remember the time that Margaret fell down the elevator shaft? A. I do.

Q. You said you saw her fall?

A. I did not.

Q. And you were on the street at that time?

A. On the sidewalk.

Q. On which side of the street?

A. Facing this way on the right.

Q. That is on this side opposite that shaft in the store of Hoffschlaeger & Co.? A. Yes.

Q. You say you did not see her actually fall?

(Testimony of Daniel V. Borden.)

A. I did not.

Q. Was your attention directed to the accident as it occurred at that time?

A. Well, I looked across the street to see if I could recognize her as she was passing at the same time I saw Souza running toward the elevator and his action indicated that something had happened.

Q. That you saw Souza running up to this shaft?

A. I did.

Q. Just before that occurred did you see her on the sidewalk? A. I did.

Q. Did you speak to her? A. Not directly.

Q. What did you do?

A. I was going down the sidewalk about ten or twelve feet away from the steps of the tax office when I noticed the girl coming by the electric light office and Mr. H. N. [262—123] Low was on my right. The girl having very short dutch cut hair attracted my attention, and I remarked, "There comes duchy."

Q. Did you say it out loud?

A. Don't exactly know how loud I passed the remark, he and I looked toward the girl and the sidewalk, I caught the eye of the girl on us.

Q. From the time that you last saw her looking over at you two until the time that you saw Souza running, how long did the time last?

A. Must have been any way from 1/4 to 1/2 minute.

Q. I will count beginning with one and then you stop me when I get to the time, in your best



(Testimony of Daniel V. Borden.)

judgment that elapsed? 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15. A. There.

Q. About the time I count fifteen.

Judge STANLEY.—That would make twenty seconds.

Q. When you first saw her, she was looking at you, do you remember just at what particular point you were? A. I remember.

Q. At what point?

A. About ten to twelve feet away from the tax office steps from the library.

Q. You were coming toward Waianuenue Street?

A. Yes.

Q. And you say ten or twelve feet, on the other side of the steps of the tax office?

A. Yes. That is when I passed the remark.

Q. Then when you last looked away from her where were you? A. That is the time.

Q. You passed the remark and she looked at you instantly? [263—124]

A. She was looking that way I passed the remark, she grinned and cast her eye directly on us.

Q. How long were you looking at her?

A. Mr. Low said something by this time, we had approached the steps of the tax office, he started to go up, but after that remark I started in walking

Judge STANLEY.—I object to the evidence proceeding any further for the reason that it is incompetent, irrelevant and immaterial, and has no bearing on this case, and would not excuse any



(Testimony of Daniel V. Borden.)

want of care on the part of the plaintiff in this case.

Judge THOMPSON.—Motion overruled.

Judge STANLEY.—I note an exception.

(Continuation of previous answer by witness:)  
—and he started towards the tax office steps slowly before the remark was passed, I turned looked towards him, my head half turned, when he got up where the platform, the door is, he went inside the tax office and after walking a few feet sideways, and as I passed I noticed Margaret walking toward the elevator.

Q. This is a busy street is it not?      A. Yes.

Q. And it is built up on both sides with stores?

A. Yes.

Cross-examination of Witness by Judge STANLEY.

Mr. RUSSELL.—There is just one more question that I would like to ask the witness:

Q. As you were looking over on that side of the street did you at that time see the elevator open?

A. The second half was open.

Q. When did you first notice that? [264—125]

A. When I saw Souza running towards it.

Q. You had not noticed it before?

A. No, sir.

Judge THOMPSON.—You speak of one half being open, the half next to the wall or the street?

A. It runs the other way. The half towards Puueo. The Puueo side.

(Testimony of Daniel V. Borden.)

Cross-examination of Witness by Judge STANLEY.

Q. This grating which you are speaking about was in front of Hoffschlaeger's store on Keawe Street?     A. Yes, sir.

Q. And on what street, Mr. Borden, is the tax office?

A. On the same street. On Keawe Street.

Q. What is the name of the street that runs at right angles to Keawe Street, and being the street on which Cabrinha's store is situated?

A. Cabrinha's store is on Keawe Street.

Q. There is a street running at right angles to Keawe Street?

A. I believe it is Shipman Street.

Q. Waianuenue on one side and Shipman on the other?     A. Yes.

Q. On which side, Mr. Borden, of Shipman Street, is the tax office, towards Waianuenue Street?

A. Yes, sir.

Q. You call that on the Waiakea side?

A. Waiakea side.

Q. Is the other side Puueo?     A. Yes.

Q. So you say it is on the Waiakea side of Shipman Street, the tax office?     A. Yes. [265—126]

Q. The electric light store which you are speaking about, whereabouts is that?

A. That is on Keawe Street, on the corner of Keawe and Waianuenue Street.

Q. Is this tax office you are speaking of on the corner of Shipman and Keawe Street?

(Testimony of Daniel V. Borden.)

A. Yes.

Q. You say you made a remark to a Mr. Low, when you saw Margaret? A. Yes.

Q. When you made that remark on which side of the steps of the tax office were you?

A. On the Puueo side.

Q. That would be the side nearest to Shipman Street? A. Yes, sir.

Q. State whether or not you recognized Margaret at that time? A. I did not.

Q. In making this remark did you make it with the intention that this girl whom you did not recognize, and who was a stranger so far as you knew at the time, should hear you?

A. I did not intend for her to hear me.

Q. It was a remark made to Mr. Low, and not to be carried by your voice across the street, so that this stranger should hear it? A. No.

Q. State whether or not, Mr. Borden, it was made in an ordinary conversational tone to Mr. Low?

A. It was.

Q. When you made this remark, you say you and Mr. Low grinned? A. Yes, sir. [266—127]

Q. There is a difference between grinning and laughing out loud. A. It was not loud.

Q. You did not laugh out loud to attract the attention of this stranger? A. No, sir.

Q. And at the time you made the remark, did I understand you to say, that you caught the eye of the girl, who turned out afterwards to be Margaret,

(Testimony of Daniel V. Borden.)

so she was looking toward you and your friend, Mr. Low?     A. Yes, sir.

Q. Then I will ask you, can you give us any approximation of the distance there was between you and the girl when you made the remark the way you say?

A. Anywheres from seventy-five to one hundred feet.

Q. And you did keep your eyes on the girl after you saw that she had looked towards you?

A. I did not.

Q. There was no acknowledging of her or any of that kind?     A. No.

Q. I believe you say that having made the remark and grinned over it, and having got the eye of the girl, you turned around to Mr. Low, continuing the conversation with him?     A. Yes.

Q. And took no more notice of the girl?

A. No.

Q. How far, Mr. Borden, had you to walk from the place where you had passed this remark until you reached the steps of the tax office?

A. About ten feet. [267—128]

Q. And during that time were you watching the girl?     A. I was not.

Q. State whether or not when you reached the steps of the tax office you walked right on or stopped talking to Mr. Low?

A. I did not stop walking; I was walking slowly up as he was going up the steps and speaking.



(Testimony of Daniel V. Borden.)

Q. Then you came along Keawe Street from the steps of this tax office until you got opposite the grating of Hoffschlaeger Company's premises?

A. Not exactly opposite, but went on so opposite me I did not see the girl.

Q. That when you had gone far enough when you thought you would be opposite her, you did not see her? A. Yes.

Q. About how far had you gone from the time that you left the steps of the tax office until you reached the place where you looked for the girl and met her? A. About fifteen feet.

Q. Between the time that you had made this remark "Here comes duchy" to Mr. Low, and got her eye on you and turned back to talk to Mr. Low you did not see the girl until after the fall?

A. No, sir.

Q. After you had caught her eye you did not know where she was looking or what she was looking at? A. No, sir.

Q. You say, Mr. Borden, that prior to the time that the girl fell you had not observed the position of the grating? A. No, sir.

Q. Did you observe it immediately after you saw Souza running excitedly toward it? A. I did.  
[268—129]

Q. Was the reason that you had not seen the position of the grating until after the girl fell, the fact you were not interested in it? A. I was not.

Q. And you were not looking to see what was on the sidewalk? A. I was not.



(Testimony of Daniel V. Borden.)

Q. You were walking slowly along Keawe Street attending to your business, until you reached the point where you saw the girl?

Judge THOMPSON.—Judge Stanley, the evidence you are eliciting from the witness does not help the case a particle in the world.

Judge STANLEY.—I respectfully note an exception to your Honor's statement in the presence of the jury that the evidence that I am now eliciting does not help the case a particle in the world.

Q. I will show you, Mr. Borden, Plaintiff's Exhibit "H," and ask you whether or not that is a picture of the grating and shows the condition in which it was as to its being half open and half shut at the time of the accident?

A. It is the exact position of the grating at the time of the accident.

Mr. RUSSELL.—We would like to recall the plaintiff, in order to make one or two corrections.

**Testimony of Margaret Fraga, in Her Own Behalf  
(Recalled).**

MARGARET FRAGA, take the stand.

Q. On your direct examination you testified that before the accident you had not been absent at all from school and that when certain dates were pointed out to you by counsel for the defendant, you stated that you had not been absent from school, do you want to make a correction?

A. Yes. [269—130]

(Testimony of Margaret Fraga.)

Q. Will you state what corrections you wish to make?

A. I do not quite remember the date; once I was sick my tonsils were swollen and the other time I had them cut?

Q. Who cut them?

A. Dr. Sexton. Then I went to Honolulu for a week, that was in June. I was not sick, I just went.

Q. What was the occasion, something about the Foresters; there was some carnival there?

A. Yes.

Recross-examination of Witness by Judge  
STANLEY.

Q. Do you remember when it was you had your tonsils cut? A. No, I don't.

Q. Do you remember when it was that your tonsils were swollen?

A. I don't know the date. I remember that I had trouble; cannot remember the time.

Q. And how long away from school when you had your tonsils cut? A. Three days.

Q. And how long when they were swollen?

A. I don't quite remember.

Q. Was this time that you were absent in June at the end of the term? A. It was during school.

Q. Did you leave school just before the end of the term and not come back?

A. Two weeks before the end of the term.

Q. And stayed away for a whole week, and

(Testimony of Margaret Fraga.)

came back and finished the term? A. Yes.  
[270—131]

Judge STANLEY.—If your Honor please, I would like to ask the witness another question, although it is not cross-examination?

Judge THOMPSON.—Very well.

Q. Is it not a fact, Margaret, that during the next school year that you were away from school for one stretch of ten days in the month of January?

A. Yes.

Mr. RUSSELL.—January of this year?

Judge STANLEY.—January of this year.

Q. Not school days that you were absent, but from about the 15th of January to the 24th of January? A. I don't remember.

Q. You don't mean ten school days, but 10 days, including Sundays and other days? A. Yes, sir.

Redirect Examination of Witness by Mr.

RUSSELL.

Q. What was the occasion of your being absent?

A. I was sick.

Mr. RUSSELL.—If the Court please, we would like to offer in evidence now the record of the appointment of Alfred Fraga, as guardian *ad litem*; in order to avoid any question may it go in the records.

Judge THOMPSON.—It may be admitted Plaintiff Exhibit "O."

Mr. RUSSELL.—If the Court please, that is all of our case, except that we wish at this time to ask

that the jury view the premises in question, as part of our case and that in doing so, with your Honor's approval, there should be some one delegated to point out the grating and I am willing to have Judge Stanley delegated. [271—132]

Judge THOMPSON.—I think after the testimony is all in. I will reserve my ruling. The chief reason is this, that questions might arise in the presentation of the defendant's case to have to go back again. The safest thing to do is to wait until all the evidence is in and view the premises at that time.

Mr. RUSSELL.—That sounds very plausible.

Mr. RUSSELL.—The plaintiff rests.

Judge STANLEY.—I now move, if the Court please, that the plaintiff be nonsuited on the ground that the evidence shows that the plaintiff was guilty of contributory negligence, which would bar any recovery in this action and I would like to have an opportunity to argue this matter.

Judge THOMPSON.—How long are you going to argue?

Judge STANLEY.—Depends on how long your Honor will allow me.

Judge THOMPSON.—Well, I don't object to hearing good argument at any time.

Judge STANLEY.—And I will ask that the jury be excused.

Jury excused.

Judge THOMPSON.—You know very well what the rule is, that I can't sustain your motion.



(Testimony of Fujii Yamagi.)

Judge STANLEY.—I take it your Honor could sustain the motion, the evidence is plain that plaintiff was walking along that street that—

Judge THOMPSON.—I remember all of that.

Judge THOMPSON.—I don't see how the Court could possibly do otherwise, than overrule the motion. [272—133]

Judge STANLEY.—I will take your Honor's ruling.

Jury recalled.

Judge THOMPSON.—The motion is overruled.

Judge STANLEY.—I note an exception.

**Testimony of Fujii Yamagi, for Defendant.**

Swearing in of witness by Clerk of the Court:

Direct Examination by Judge STANLEY:

Q. What is your name?     A. Fujii Yamagi.

Q. What is your business, Fujii?

A. Warehouseman and deliveryman.

Q. Where?     A. Hoffschlaeger.

Q. Hoffschlaeger, Limited, store in Hilo?

A. Yes.

Q. Fujii, do you remember the accident which happened to this girl, Margaret Fraga, in August of last year?     A. Yes.

Q. That was when she fell down the elevator in front of Hoffschlaeger's store?     A. Yes.

Q. Now, had you been working in that elevator or done anything to the elevator just before the accident happened?

A. I was in the store.



(Testimony of Fujii Yamagi.)

Q. Now, do you know who opened the elevator gate? A. I opened it.

Q. How many doors are on that elevator?

A. There is two.

Q. How many of those doors did you open?

A. Half, one side.

Q. And that was on the side nearest Shipman Street? A. Yes. [273—134]

Q. For what purpose Fujii had you opened that gate?

A. I opened so that I could go down in the cellar to take some goods out.

Q. And put them where?

A. On the sidewalk.

Q. To be left there; somebody was to call for them? A. Somebody was to call for them.

Q. Why did you only open one gate?

A. Well, it was wide enough to let the goods out.

Q. With one gate open, there would be sufficient room to allow you to put up the goods which you wanted to get on the sidewalk? A. Yes.

Q. It was not necessary to open both gates?

A. No.

That is all.

Cross-examination of Witness by Mr. RUSSELL.

Q. How long had you been working there at that time? A. Two years and five months.

Q. The reason why you only opened one side was because that was wide enough to permit the passage of the goods? A. Yes.

(Testimony of Fujii Yamagi.)

Q. That was the only reason that you had?

A. Yes.

Q. The wagon had not arrived there to take those goods?

A. Not our wagon; it was country wagon.

Q. But that wagon had not arrived? A. No.

Q. You did not know how long it would be?

A. No.

Q. When you went down there, you went down for the [274—135] purpose of putting those goods on the elevator? A. Yes.

Q. And you were not to take those goods up until the wagon had arrived?

A. Were going to take right up.

Q. It would have taken you some little time to get them from the cellar? A. Yes.

Q. How long were you down there before the girl fell? A. Two minutes.

Q. Two full minutes? A. Yes.

Q. You know how long that is, a minute?

A. Sixty seconds.

Q. You could count one hundred twenty seconds fairly slow before the girl fell down? A. Yes.

Q. You have been working there two and a half years? A. Yes.

Q. You knew that was a busy street? A. Yes.

Q. You know that people pass back and forth?

A. Yes.

Q. You know that school children pass?

A. Yes.

(Testimony of Fujii Yamagi.)

Q. You know that was the hour for them to pass?     A. Yes.

Q. You never thought about school children at that time?     A. No.

Q. Don't you usually when you go down in the basement shut the gate after you, don't you do that?

Judge STANLEY.—Object if the Court please, incompetent, [275—136] irrelevant.

Mr. RUSSELL.—I will withdraw the question.

Q. You helped take the girl up and took her to Cabrinha's?     A. Yes.

Q. You told Mrs. Cabrinha—

Judge STANLEY.—Object. Not proper cross-examination. The witness is called for the purpose of showing who opened the gate and why it was opened.

Mr. RUSSELL.—Question withdrawn.

That is all.

Judge STANLEY.—Mr. Borden take the stand.

### **Testimony of Mr. Borden, for Defendant.**

Q. Mr. Borden, state whether or not at any time or times following the accident to the plaintiff, Margaret Fraga, you have seen her walking on the streets of Hilo?     A. I have.

Q. Have you seen her only once or a number of times?

Mr. RUSSELL.—That is objected to, as incompetent, and irrelevant, no foundation having been

(Testimony of Mr. Borden.)

laid for this question; it is evidently intended to introduce for the purpose of discrediting the testimony of the plaintiff, and to do so, it is incumbent upon the defendant to first point out the particular time and place the plaintiff was seen to walk.

Judge THOMPSON.—The Court overrules the motion.

Q. Have you seen the plaintiff walking on the streets of Hilo once or a number of times since the accident?     A. A number of times.

Q. Did you remain in Hilo from the time of the accident up to the present time?

A. I did not.

Q. How soon after the accident did you leave Hilo?

A. I left Hilo on September 13th. [276—137]

Q. And returned when?     A. September 30th.

Q. State whether or not you saw her walking on the streets of Hilo before the 13th of September?

A. I did not.

Q. State how soon after your return to Hilo on the 30th of September did you first see her?

A. Between two or three weeks.

Q. That would be in the middle of October?

A. Yes.

Q. Where was she walking at that time?

A. She was walking on Keawe Street, towards Cabrinha's store.

Q. From the direction of Waianuenue?

A. Yes.

Q. You have seen her a number of times?

(Testimony of Mr. Borden.)

A. Yes.

Q. Have you seen her on any other occasion walking on the same street in the same direction?

A. May have seen her twice a month or so, I always see her on Keawe Street, going towards Cabrinha's store.

Q. How long has that continued?

A. I have seen her about twice a month.

Q. You mean up to the end of the year?

A. Up to the present time; or within two months from now, I have not seen her lately on the street.

Q. It would be then up to the month of March; you saw her from the middle of October towards the end of March, about twice a month?

A. About twice a month.

Q. State whether or not you have seen her on any other street?     A. I have not. [277—138]

Cross-examination of Witness by Mr. RUSSELL.

Q. The occasions that you saw her were always after school, were they not?     A. It was.

Q. And you know, do you not, that she walked down slowly to Cabrinha's and there take a machine to go home?     A. I have seen her in a machine.

Q. That is the same day, later on you have seen her in a machine?     A. Yes, I did.

Q. And you noticed that she walked slowly?

A. I did.



(Testimony of Mr. Borden.)

Redirect Examination of Witness by Judge  
STANLEY.

Q. And whereabouts is the Union Grammar school which she attends?

A. Well, it is up here about three blocks.

Q. On what street is the school?

A. On Kapaiolani Street, used to be School Street.

Judge THOMPSON.—You mean two blocks from Cabrinha's?

A. Three blocks from the front of this building.

Q. And Keawe Street is how many blocks down?

A. One block.

Q. That would be four blocks down Waianuenue Street and one block across?

A. It would be four blocks in all from the school to Cabrinha's store, downhill.

That is all. [278—139]

**Testimony of L. L. Sexton, for Defendant.**

Swearing of witness by Clerk of the Court:

Q. What is your name?      A. L. L. Sexton.

Direct Examination by Judge W. L. STANLEY.

Q. Doctor, you are a physician and surgeon practicing in the City of Hilo, are you not?      A. Yes.

Q. And how *how* have you been so practicing?

A. Since 1910.

Q. And you are duly and regularly licensed to practice under the Territorial Laws?      A. I am.

(Testimony of L. L. Sexton.)

Q. State, Doctor, where you received your medical education?    A. University of California.

Q. When did you enter the University?

A. In 1902.

Q. And you graduated from the University of California?    A. I did.

Q. With a degree in medicine and surgery?

A. I did.

Q. In what year?    A. In 1907.

Q. Making it a course of five years?

A. Yes, I was out one year.

Q. State, Doctor, what if any experience you had in practice prior to coming to Honolulu?

A. I spent a year in the Southern Pacific Hospital, Sacramento, California; I spent 18 months in the Queen's Hospital in Honolulu, and 11 months at Hakalau; the remainder of the time in Hilo. [279—140]

Q. Doctor, state what, if any, experience you have had with the taking and interpreting of what is practically called X-ray plates?

A. I have had quite a good deal of experience and taken interest in that since graduation; worked in it more or less ever since.

Q. State whether or not you own an X-ray machine?    A. I do.

Q. And have owned one for about how long?

A. Five years.

Q. And prior to that and since your graduation you have taken an interest in the subject?

A. Yes. I have.

(Testimony of L. L. Sexton.)

Q. And have continued it in your practice?

A. Yes.

Q. I hand you a plate, being exhibit "B" in this case, exhibited as photographic X-ray plate taken on the 4th day of September of last year, and ask you to state whether or not you have examined that before? A. Yes, I have.

Q. What picture is shown on that plate, Doctor?

A. Picture of a knee.

Q. Can you tell whether it is the left or right knee, or do they look so much alike in a plate?

A. This film is a duplex film, motion on both sides, and I do not know which side the impression is on. Oh, yes; I do. That is the left knee.

Q. State, Doctor, when you first examined that at my request? A. Monday of this week.

Q. And, Doctor, will you please state, what, if any, pathological condition you find represented on that plate; calling your attention particularly to the upper epiphysis [280—141] of the tibia?

A. I find no pathological condition represented.

Q. What do you mean, Doctor?

A. I find no diseased condition, either as the result of disease, or injury; in other words, there is nothing represented here except the normal condition of the bone, that you would find in a healthy normal individual.

Q. Do you mean, Doctor, that the plate shows no injury to the leg? A. Yes.

Q. I will ask you, Doctor, calling your attention to the— (Question withdrawn.)

(Testimony of L. L. Sexton.)

Q. What, Doctor, is the tubercle of the *tibier*?

A. The downward like projection that extends down on the front of the tibia; downlike projection of the upper epiphysis.

Q. And how is that separated, Doctor, from the shaft of the tibia?

A. Separated by an intervening cartilage.

Q. And what is the name of that cartilage?

A. Epiphyseal cartilage.

Q. Calling your attention, Doctor, to that particular portion of the leg shown on the plate, state whether or not the picture shows any abnormal condition of the tubercle of the tibia. From the shaft?

A. It does not.

Q. I hand you, Doctor, Plaintiff's Exhibit "C" and ask you whether you recognize that as a print of the plate you just examined?

A. I believe that it is. [281—142]

Q. From what are you able to receive the more detail,—the plate or a print of the plate?

A. From the original plate.

Q. Now, Doctor, calling your attention to the print, state whether or not this print shows the epiphyseal line, or line of the epiphyseal cartilage?

A. It does.

Q. State whether or not that epiphyseal line is marked on the print by any letters or lines representing the dotted lines inked in?

A. The epiphyseal line is fairly accurately followed by the ink line which—

Q. Which ink line do you mean, Doctor?



(Testimony of L. L. Sexton.)

A. A to C.

Q. State, Doctor, whether that print shows any abnormal separation of the epiphyseal cartilage between the end of the tubercle and the shaft?

A. No, it does not show any.

Q. I will show you, Doctor, when I get it, two other pictures being exhibits "D" and "E," of what purports to be the same leg and ask you whether or not you have examined those plates before at my request? A. Yes, I have.

Q. There are two pictures on that plate?

A. Yes.

Q. There are two plates, one exhibit? A. Yes.

Q. Do they both represent a picture of the leg from the same angle? A. No. [282—143]

Q. What does exhibit "D" present? One, Doctor, represents a side view, a picture taken at the side of the leg and the other represents a picture of the anterior and posterior view, does it not?

A. This one on this side is the lateral view, this one is the anterior-posterior view.

Q. State whether or not, Doctor, the print of the lateral side shows any pathological condition of the knee. A. It does not.

Q. That is the picture taken from the lateral?

A. Yes.

Q. That is the picture taken from the lateral, you find no signs? A. No.

Q. Either from accident or disease? A. No.

Q. You find any signs, Doctor, in that print of



(Testimony of L. L. Sexton.)

any widening of the epiphyseal cartilage between the tubercle and the tibia?

A. None, except the normal.

Q. Are you able to tell anything as to the condition of the leg represented there from the anterior and posterior view?

A. In reference to the epiphysis, tubercle; no, don't show any.

Q. Does the plate show any injury to any portion of the leg? A. No.

Q. And how about exhibit "B," does that show any injury to the knee? A. No. [283—144]

Q. I ask you because I called your attention to the epiphyseal cartilage and the tibia?

Q. I will ask you, Doctor, to state whether or not these pictures, plates, which you have been examining will were taken by you, made by you?

A. Made in my office.

Q. You were in Hilo when they were made?

A. No.

Q. That is the ones made on September 4th and March 4th. A. No.

Q. Where were you then, Doctor?

A. I was absent from Hilo. I think I was in New York.

Q. Are you associated with any other medical man? A. Yes, with Dr. Heck.

Q. And was he present at that time in Hilo?

A. He was.

Q. Where is he now? A. On the coast.

Q. And has been for how long?

(Testimony of L. L. Sexton.)

A. About ten days; he left about ten days ago.

Q. I will ask you, if at my request, or the request of myself and counsel for plaintiff in this case you had any pictures taken of the girl's, Margaret Fraga's, leg this week?     A. I did.

Q. On what day?

A. I don't remember; either yesterday or day before.

Mr. RUSSELL.—It is admitted that it was Tuesday the 24th inst. [284—145]

Q. How many plates were taken at that time, Doctor?     A. Four.

Q. What views?

A. Two lateral views of the left leg and two lateral views of the right leg.

Q. I hand you Plaintiff's Exhibit "K" filed in this suit, consisting of two plates numbered 1014 and 1015, and ask you if those plates were made in your office?     A. They were.

Q. And what do those plates show, Doctor—what portion of the body?

A. Shows the two lateral views of the left knee.

Q. Of the plaintiff in this case?     A. Yes.

Q. Have you examined the plates before?

A. I have.

Q. State whether or not you can find any indications of injury, either by accident or from disease, shown on those plates.     A. There is none.

Q. Calling your attention, Doctor, particularly, to the tubercle of the left leg, the tibier and the epiphyseal cartilage separating those two, state whether

(Testimony of L. L. Sexton.)

or not anything abnormal are in either of those pictures?     A. Nothing abnormal.

Q. Can the fact that there is nothing abnormal in a particular leg generally be definitely determined by the examination of a picture of that leg only?

A. Not unless the injury is—unless the departure from the normal is marked. In the case of a break around the bone, you would know that it is abnormal; but the condition varies, and at different ages it would be impossible to determine within any narrow limit at all, how much, if any, [285—146] departure in any given case from the normal without comparison with the known normal condition and preferably of the same individual.

Q. Does this width of the epiphyseal cartilage between the tubercle and the tibial vary in different individuals of the same age and sex?

A. It does.

Q. So far as you know, any, is there any standard width of that epiphyseal cartilage?

A. The only standard is the comparison of the part affected in the same individual. There are some variations in the same age and sex that there can be no standard made.

Q. You state, Doctor, at the same time plates exhibited to you were made, you also had taken pictures of the right leg of the plaintiff?     A. Yes.

Q. I hand you Plaintiff's Exhibit "N" and ask you to identify that as the two plates of the right leg?     A. Yes.

(Testimony of L. L. Sexton.)

Q. Now, Doctor, in forming your opinion on the question as to whether there was anything abnormal in the condition of the epiphyseal cartilage between the tubercle and the shaft of the left leg of the plaintiff, as shown by those pictures, have you passed your opinion on any one picture alone, or on a review and examination of all the plates together?

A. Taking all the plates together, collectively, I have passed my opinion.

Q. What comparison of the plates of the left leg taken last Tuesday with the plates of the right leg taken on the same day, indicate to you?

A. They both indicate a normal condition of each part. That is the lateral views of the right knee indicate [286—147] a normal condition of the part shown in that the two lateral views of the right indicate a normal condition in that picture.

Q. Can you, Doctor, show to the jury on these plates the part which you were speaking of and indicate the part which you say are similar?

(Witness indicates to jury the parts.)

Q. You say that a comparison shows you that the condition on both legs were normal? A. Yes.

Q. Will you point out to the jury the parts to which you have been referring?

(Witness indicates to the jury the parts.)

A. This is the tibial or large bone and this is the kneecap here. On here this little point, the same thing here is what we are talking about, the tubercle. That the muscle attaches to in moving



(Testimony of L. L. Sexton.)

the leg. This line, what we call the epiphyseal line, begins here, and under it and comes down here and goes down to this point here in every person until the age of 20 to 25; the same thing is shown here, but with a great deal of variation; for instance this is the same leg; this is the right leg here, and the right leg here, 1017 and 1016, plates. One picture was taken from this side of the leg. One taken from the internal aspect and one from the external aspect.

Q. By the internal aspect, what do you mean?

A. Inside of the leg. And the other from the outside of the leg.

Q. Here, Doctor, on exhibit "C" both in the epiphysis, correct me if I am wrong, and below the line "A-C" on the shaft of the tibia are some wavy white lines. State whether or not those white lines indicates anything in the nature of fractures or that kind? [287—148]

A. Those are scratches made by the operator accidentally in making the picture while the plate was wet. With his nail.

Q. It has nothing to do with the bone?

A. No.

Q. You have, Doctor, testified that as the result of your examination of all these plates there is nothing abnormal shown in the plates of the plaintiff's left knee? A. Yes.

Q. Or in the tubercle of the left knee, or in the epiphyseal cartilage between the knee, between the knee and the epiphyseal? A. Yes.



(Testimony of L. L. Sexton.)

Q. I will ask you if you—is there any separation of the epiphysis of the tubercle? If there is any such separation, or indications that there ever was?

A. No.

Q. Now, Doctor, assuming that there was a separation of that epiphysis between the point indicated between the tubercle and the tibia, state whether or not, state whether there is in medical or surgery science a recognized method of treatment to be followed in the curing of that condition?

A. Yes.

Q. Will you state what this is?

Objection by Mr. RUSSELL.—Objected to as immaterial and irrelevant. If the Court please, if they are trying or attempting to show that the method of treatment of Dr. Osorio was unskillful or negligent, that would not bind the plaintiff, unless they can show that Dr. Osorio's reputation as a physician is unskillful. All the law requires upon an injured person is to select a duly qualified physician.

(Objection overruled.)

Mr. RUSSELL.—Exception noted. [288—149]

Q. Assuming that there is a separation of the tibia from the tubercle, the recognized treatment is what we want?

A. The recognized treatment of a separation of the tibia from the tubercle, is first of all, rest in bed with the knee held out in a straight position, and kept in a straight position for a definite length of time, and the other attendant treatments, attention

(Testimony of L. L. Sexton.)

to the bowels, and do all the other things that would go along with other conditions would have to be recognized, but the essential part of this treatment of this condition is to render the leg immobile or keep it from moving by some apparatus or another, or a piece of wood put on the back of the leg or on the side of the leg, long enough to keep the individual from moving the knee-joint. A recognized splint is a long strip of wood from the ankle to the hip or on the side, or a plaster of paris cast, or a hammock or pulley that keep the knee absolutely quiet from movement, and must be kept up continually.

Q. And with that treatment, Doctor, what would be the probable duration of disability of the patient?

A. You mean disability up to time in bed or when he is ready to begin his occupation.

Q. The time in bed only?

A. Three or four weeks.

Q. And how long would it be after that assuming that the patient were receiving the treatment you have described, would it be before the patient had fully recovered. From the time of injury to full recovery?

A. Four weeks in bed and a couple of weeks walking very carefully, six weeks, a month or six weeks after that should see complete recovery.  
[289—150]

Q. Now, Doctor, what is the object of keeping the leg immobile in that treatment?

A. It goes back as a matter of mechanics. The

(Testimony of L. L. Sexton.)

thing that produces motion of this leg, either leg, the muscle that moves this leg or any leg in that direction, the chief muscle is this big muscle here, and it must be kept quiet; this muscle comes down across the kneecap and attaches to the tibia tubercle, and it must be kept in a quiet state so that the injury can heal.

Q. And what is that big muscle called?

A. Quadriceps femoris and begins in the ligamentum patellae which is a fine strong band of fibrous tissue and connects to this tubercle and pulls on that and pulls the leg up and acts as a pulley, and this injury here being between this tubercle and the bone, so that pulling that on that tuber would pull it away from the bone and would make the condition worse. You already have a separation at pulling apart of that tuber from the bone and if you continue you continue to separate still further, the idea is to keep that leg in that position and when it is in that position there is no pull on that part which you want to keep at rest.

Q. You say, Doctor, that this leg should be kept immobile for a period of four weeks.      A. Yes.

Q. So that there can be no action by the quadriceps muscles on the injured tubercle?      A. Yes.

Q. At the end of the four weeks, Doctor, what becomes of the splints or cast or other mechanical contrivance?

A. I think I would modify my previous statement that [290—151] I made including a cast, I don't think that it would be proper, for the sim-

(Testimony of L. L. Sexton.)

ple reason that the cast is too cumbersome to take proper care of the knee; I believe it is being discarded very largely, as the doctors themselves or other attendants cannot exercise the knee-joint during that time.

Q. Not using the cast very much, now do I understand in the treatment, where the leg is placed in a splint or other mechanical contrivance, is included a course of manipulation of the injured part by the doctor or nurse?     A. Yes.

Q. What is the object of this?

A. The object is to prevent any stiffening of the knee-joint. It has to be done by some one other than yourself to appreciate it.

Q. Explain to the jury what difference, if any, there is between having that knee-joint manipulated by a third party, or whether the patient manipulates it himself by the ordinary use of flexing and extending it?

A. All the difference as between running an automobile on its own gasoline, and pushing it with your own gasoline. The only way that a patient can move that himself is by the use of that muscle which pulls on this muscle; you don't want to pull on it as it increases the injury to the diseased part. When some one else does that there is no tightening of the muscle.

Q. That is the outside manipulation takes the place of the muscles?     A. Yes.

Q. Now, in describing this treatment you are



(Testimony of L. L. Sexton.)

necessarily including manipulation in order to prevent a stiffening of the knee-joint?

A. Yes. [291—152]

Q. That is generally called ankylosis?

A. When it is complete it is called ankylosis.

Q. Now, Doctor, I will ask you to state whether or not this treatment that I will describe to you of an injury of that nature would be considered proper by recognized medical authorities, namely, the bandaging of the injured leg above the knee and below the knee with a tight adhesive plaster. Putting the patient to bed for a period of three weeks, preventing so far as can be done, mobility of the leg while the patient is confined to bed, by means of pillows lying on either side, and allowing or permitting the patient during the last of such three weeks to leave the bed and move around the house for the purposes of nature or for other purposes, including going from one room to another for drinking water.

Mr. RUSSELL.—Objected to on the ground that the plaintiff cannot be bound by any particular method of treatment unless it is shown that there was not proper judgment exercised in the selection of surgeon.

Judge THOMPSON.—Motion overruled.

Mr. RUSSELL.—Note an exception.

Judge THOMPSON.—The Court understands, Judge Stanley, that that is a hypothetical question.

Judge THOMPSON.—(To Witness.) You may answer the question.



(Testimony of L. L. Sexton.)

A. That treatment is partly right. I would say that it is a good deal wrong because of the fact that the leg was not kept absolutely away from the action of the muscle during the entire time. I believe that this is the most important part of the whole treatment for the reason that just the moment you allow that muscle to act, even for one step, you are almost sure to tear down all of the healing process that has been going on for twenty-four hours. [292—153] Therefore taking one step forward retards the healing process, and I believe every authority that I have ever read will lay more stress on this, that is, the all-important point to the treatment next to the personal supervision of the exercise of that joint.

Mr. RUSSELL.—I now move that the answer of the witness be stricken upon the ground that it cannot relieve defendant and also upon the ground that assuming that the treatment referred to, and included in the so-called hypothetical question was unsuccessful or negligent, that that would not relieve the defendant of any liability whatsoever, and upon the ground that all a plaintiff is required to exercise is reasonable fair judgment in the selection of the physician or surgeon.

Judge THOMPSON.—Motion overruled.

Mr. RUSSELL.—Note an exception.

Q. When you speak, Doctor, of the treatment and the recognized treatment including a confinement to bed for a period of three or four weeks, do you

(Testimony of L. L. Sexton.)

mean that there is any standard setting four weeks as the extreme limit?

A. No, I don't believe there is any. There is no definite standard. I will say four to five weeks with the treatment as I have previously outlined, carried out rigidly, that in four to five weeks, ninety per cent of the cases should be well; well enough to get up on their bed and use care in moving carefully and in not undergoing any extreme forcible exercise for a couple of weeks more, I think that four or five weeks in bed with the proper after treatment should see a complete recovery in ninety per cent of the cases. [293—154]

Q. Is there any medical authority, Doctor, that you know of or ever read of for the proposition that if you have not a healing within three or four weeks then it is useless to keep the patient in bed; that nothing can be done for the injury by rest and that nature must be allowed to take its course?

A. I don't recall any authority that would let me— I don't recall any authority for that supposition at all. May I repeat the question. Do I know of any authority that says that after a period of three or four weeks, if healing is not complete nature will have to take its course, and nothing can be done and that nature will have to take its course. I don't know of any such authority.

Q. You said you don't know of any such authority? What is your professional opinion on that?

A. I would say that that was definitely wrong.

Q. Do you know of any authority, medical au-

(Testimony of L. L. Sexton.)

thority for this proposition that if an injury which may be called a separation of the tubercle of the epiphysis, is not healed within three or four weeks, or four of five weeks, the person injured being of the age of thirteen years or thereabouts, that there will be no healing until the epiphyseal cartilage is changed into bone, when the patient reaches adult life and between the ages of twenty and twenty-five?

A. I don't know of any authority for that statement.

Q. You are familiar with a number of works, that are standard authority. A. I am.

Q. Have you ever come across in your reading either of those propositions? A. No. [294—155]

Q. And what is your own professional opinion, Doctor, on the last proposition,—that if no complete healing takes place three or four weeks, that there will be no healing of the epiphyseal until the age of twenty to twenty-five.

A. I don't see any reason for the statement. I don't know why any reason at all; any reason why the process of repair and healing should go on a strike for a matter of twelve years; I don't know of any reason for the statement.

Q. Then your opinion is there is no reason for the statement?

A. It is borne out in everyday practice.

Q. And you say it is not recognized by surgical authorities? A. It is not.

Q. Now, Doctor, assuming that after the expiration of a stay in bed of three weeks, the treatment

(Testimony of L. L. Sexton.)

being as I before described to you, adhesive band below and above the knee, and the patient's leg being kept immobile by means of pillows on either side of the leg, that the patient is allowed to attend school, patient being a girl of the age of thirteen, daily, to walk about a school, and walk about, around her home premises, at various times, when not at school, and with merely an adhesive bandage strapped around the leg, what is your opinion,—what do you say as to that treatment as being recognized and proper or not.

Mr. RUSSELL.—Same objection as the previous question.

Judge THOMPSON.—Objection overruled.

Mr. RUSSELL.—Note an exception. [295—156]

Q. That before the separation has healed, the patient is allowed to attend school and walk about at school, and is allowed to walk around the house, what do you say, Doctor, as to whether this is a recognized treatment?

Mr. RUSSELL.—Note an objection.

Judge THOMPSON.—Objection overruled.

Mr. RUSSELL.—Exception noted.

A. The same objection is raised to that form of treatment as referred to in the other namely, that before this tubercle is fastened again by healing process, if you allowed the patient to walk around and use the leg and pull that leg, it would not heal, it is not recognized as right, but is recognized as wrong.

Q. State whether or not, Doctor, the bandage



(Testimony of L. L. Sexton.)

around the knee would prevent the play of the muscle upon the injured part?

A. It would not. The bandage that you spoke of. No.

Q. Would it make any difference, Doctor, whether the patient was to extend and flex the leg in walking, or walk with a stiff leg. Would that make any difference in the amount of pull in the tubercle, the amount of pull exercised on that tubercle by walking stiff-legged would be more than the pull on that tubercle would be more than walking on that leg.

A. It would be separated.

Q. Why?

A. For the reason you have to have the tendon contracted to keep the leg stiff. The act of walking is almost involuntary and automatic; part of the weight falls forward as the body is inclined and the muscles are used, whereas walking stiff-legged you have to keep the muscles tight. You have more strain walking stiff-legged.

Q. And walking in either way would have a constant [296—157] tendency to increase the injury and retard the recovery?

Judge THOMPSON.—Need not answer the question. Both parts of the question have been answered in the opinion of the Court.

Q. Assuming that after a stay in bed of three or four weeks under the treatment I have described to you, with adhesive bandage around the knee, and assuming that after the expiration of that three or four weeks, the patient is permitted to do the walk-



(Testimony of L. L. Sexton.)

ing that I have described, what in your opinion, Doctor, would be the probable duration of the disability?

A. Well, it would be very hard to determine. As long as you continued the irritation by walking, I don't see how you could get any union of the two parts; I presume that if it were continued long that inflammatory process would set up there so that you ultimately would have a fibrous union.

Q. You mean a deformity would occur?

A. Very likely to. If you keep pulling that tubercle I presume eventually you would have quite a dent.

Q. Then would it be right to say, Doctor, that the period of recovery from that injury would be delayed as long as the patient was allowed to continue walking?

A. Why, no. I don't know there is any authority on that point. Nature might get ahead of that if kept up long enough. The longer you keep up the walking and irritation the longer it would not heal.  
[297—158]

Q. It has been suggested here that any injurious effects upon the injured part there might be owing to the action of the muscle on the injured part in the act of walking might be offset to some extent by the counter-irritation that would be set up in the act of walking. Do you know of any authority, any reason behind such a proposition?

Mr. RUSSELL.—I take it that counsel has that wrong. Doctor Osorio said that counter-irritation

(Testimony of L. L. Sexton.)

would be necessary and admissible in the present case.

Judge THOMPSON.—That should not be discussed in the presence of the jury.

Mr. RUSSELL.—I object to the question.

Judge THOMPSON.—I will state that you are doing the thinking in this question; ask your question. The Court don't know your question.

Judge STANLEY.—But if the Court please I have put the question in the language that was used by the witness, not this witness.

Q. Is there any authority for the proposition that any injury that would be done through allowing the quadriceps tendon or muscle to act upon the injured part during the process of walking, would be offset by the fact that the counter-irritation would induce boney tissue?

Mr. RUSSELL.—That is objected to as being immaterial, irrelevant; that is as far removed as black is from white, and serving no purpose whatsoever.

Judge THOMPSON.—The Court overrules the objection.

Mr. RUSSELL.—Note an exception.

Q. Is there any authority for the statement that the injury that would result from the action of muscle acting on this tubercle would be offset by the counter-irritation that would be set up by the same?  
[298—159]

A. No. There is no authority that I know of for that. All the authorities say that we must put that muscle to rest so it won't further increase the in-

(Testimony of L. L. Sexton.)

jury; that is not counter-irritation but direct irritation. That would rather increase the injury by walking around rather than offsetting it.

Q. Would, Doctor, the introduction of irritation into this process, whether the irritation be direct or indirect, be a necessary or advisable part of the treatment?     A. No.

Q. Doctor, would the substitution of a tight rubber band in place of the adhesive plaster bandage, be an improvement on the treatment which you have said is not only not recognized, but recognized by medical authorities as wrong?

A. The substitution of the tight rubber band instead of the adhesive bandage—I think I would rather have the adhesive bandage. I think it would be less injurious than the rubber bandage, and the rubber bandage would not be a benefit, I think.

Judge THOMPSON.—Doctor, do you speak from experience or from theory?     A. Both.

Q. Doctor, you have testified that in case it became necessary to keep the patient in bed for three or four weeks, or longer, any danger of ankylosis could be avoided by manipulation of the joint would be a necessary part of the treatment, I would ask would there be any danger of the patient suffering from atrophy of the limb, through being kept in bed under the treatment you have described, for several months?

A. Whenever the muscles are not exercised there is bound to be atrophy. A man stays in bed for twenty-four hours, there is a certain amount there.

(Testimony of L. L. Sexton.)

The longer he stays in bed [299—160] the longer the muscles are inactive and the body is not assuming its normal amount of exercise, there is a certain amount of atrophy there.

Cross-examination of Witness by Mr. RUSSELL.

Q. Doctor, you and Doctor Osorio are not on very friendly terms are you?     A. Not that I know of.

Q. You and he don't speak to each other?

A. Not so far as I know.

Q. Is it not a fact that you and he have not exchanged any conversation other than that which is necessary in connection with your practice in the hospital?

A. Why only two days ago I was talking to him, not very much.

Q. Is it not a fact, Doctor, you feel very unfriendly towards him?

A. Doctor Osorio and I have differences, the same as I have differences with every other doctor in town, but I don't hold them up very long.

Q. As a matter of fact do you not feel unfriendly towards Doctor Osorio?     A. Why, no.

Q. And have you not expressed yourself as having a dislike for Dr. Osorio?

A. I have, and I guess I have for almost every other man in town on occasions. It lasts temporarily.

Q. As a matter of fact don't you as a rule when passing Dr. Osorio, you don't even look at him?

A. No. [300—161]



(Testimony of L. L. Sexton.)

Q. You know that Dr. Oseorio has been treating this case? A. Yes.

Q. Fraga was formerly a patient of yours, was he not?

A. Why, one of the children was; about four or five years ago.

Q. How about Mrs. Fraga; did you not operate on Mrs. Fraga?

A. I would not be sure if I did not or did.

Q. And a year or so ago you cut the tonsils of his children?

A. I believe I did. I would not swear to it; I can produce the evidence.

Q. You mean to say that you don't at this time recognize Fraga as being a former patient of yours?

A. I know Fraga; I have known him for years; I don't remember him personally.

Q. How about his family? A. Yes.

Q. You treated his family? A. Yes, I have.

Q. And that at the present time, having attended the members of his family and seen them within the past year, you have not been called in for his family?

A. I think it has been longer than that.

Q. Now, Doctor, with reference to these plates, you say that the one taken on September 4th and the one taken on March 4th, you were away were you not? A. Yes.

Q. Dr. Heck was here? A. Yes.

Q. As a matter of fact, you don't know when



(Testimony of L. L. Sexton.)

photographs are taken of the patients, that are not your own, you are very rarely present. [301—162]

A. Most of the time I am present, but I don't do any of the work myself.

Q. For instance with reference to the photographs that were taken last Tuesday, were you present? A. Yes.

Q. You saw them taken? A. Yes.

Q. Dr. Osorio was present? A. Yes.

Q. That was the occasion you had reference to when you said you had a talk with him?

A. Yes.

Q. Now you say that as you view the first photograph of September 4th, 1920, you could not discover that there is anything abnormal there, is not that so? A. No.

Q. You could not say from that photograph that it was perfectly normal? A. No.

Q. With reference to the second photograph, that of March 4th, you say that you cannot tell if there is anything abnormal? A. Yes.

Q. But you would not say that you can tell if there is anything abnormal in one of the plates? In other words there may be an abnormal condition present in the leg that was photographed on September 4th, and there may be an abnormal condition in the leg photographed on September 4th, neither you or any other surgeon by an examination of those photographs can say that they can see that abnormal condition?

(Testimony of L. L. Sexton.)

A. From examining it by itself I would not say that it is normal or abnormal. [302—163]

Q. We get down to the last photograph, as there were three occasions when photographs were made. Your opinion is, as I take it, that from an examination of the two photographs taken this last time, last Tuesday, and because of the fact of comparison of the leg at the time, you can say there is nothing of the right leg at the time, you can say there is nothing abnormal there, nothing wrong there?

A. Yes.

Q. That is due to the fact that they are absolutely alike, due to the fact that they belong to the same individual, only difference being different legs, and that they are alike in the amount of separation which is the point under discussion; in order to make a comparison you have to take a photograph of each leg in the corresponding individual position? A. Yes.

Q. The angle would have to be the same?

A. Yes.

Q. The focus would have to be from the same point? A. Yes.

Q. The focus of the X-ray would have to be the same? A. Yes.

Q. So that you could see the same picture of each leg from the same angle and standpoint?

A. Yes.

Q. And when they are identical then you know that there is a normal condition?

A. Identical within certain minors.

Q. If there is a difference such as any layman

(Testimony of L. L. Sexton.)

can see, this would suggest some abnormal condition.

A. Well, now, an X-ray plate is one of the most deceiving things, if it is not understood and a difference might be looked upon by an experienced person, *like* a scratch on the plate would be drawn out immediately, by someone who understood the plate. [303—164]

Q. Laying aside certain indications that are apparent to be defects in the plate itself, any difference would suggest an abnormal condition or state?

A. Why, to an inexperienced eye it might be and to an experienced eye it might not be.

Q. It is a matter of photography? A. No.

Q. Let us assume that a photograph of a right leg or right knee is different in photography, that the picture of it is different from that represented by the picture of the left knee, then that would suggest something wrong?

A. Unless you can account for the difference in position and account in the other plate a number of details that enter in the reading of a plate.

Q. I will ask you another thing. Is it not a fact that a surgeon is sometimes not assisted by an X-ray unless he has a knowledge of existence of that condition? A. Yes.

Q. So that a condition that would not be recognized by a surgeon who is a stranger to the case might be recognized by a surgeon of the same ability, who has a familiar knowledge of the case?

(Testimony of L. L. Sexton.)

A. Knowledge and the X-ray, they are taken together.

Q. Is it not a fact that a surgeon who is a stranger to the history of a certain case in examining a photograph of that case may not recognize the particular condition that exists there, but another surgeon, who by reason of the fact that he has treated that case, handled it, and knows its history, and knows the other symptoms may be able to recognize from that same plate? A. Yes.  
[304—165]

Q. So that the fact that when you examine a plate and see no abnormal condition there, does not mean that a physician who has handled only is familiar with the case may see an abnormal condition from that same picture?

A. I don't believe that is true; my previous statement applies to, was X-ray work in general, it must be taken with the history and locality and each one has its particular case.

Q. Is it not a fact that the text-books in describing methods of diagnosis of fractures of the bones, or separations of the epiphyseal prescribe the X-ray as one of the methods to be resorted to after certain methods have been applied?

A. No. It is one of the first things used altogether in diagnosing.

Q. You recognize Keene's work? A. I do.

Q. Is it right that the order of examinations would be first an examination of the general condition, examination for shocks, loss of blood or injury. In-



(Testimony of L. L. Sexton.)

spection of injured parts, this is done before the X-ray is taken, is that the order?

A. I don't know that there is any definite order in making examinations of that kind.

Q. If Keene says so, it would be correct, would it not? A. I suppose so.

Q. Now, Doctor, I will show you these plates, and ask you if you recognize those as being the plates taken on the 24th?

A. (Judge STANLEY.) If the Court please, before this question is put, I would like to have the last question put to the witness. Counsel states to the witness that this book Keene states that a certain order should be followed, whereas the page that he is reading from says that the order [305—166] of examination can be varied according to each individual case.

Mr. PATTERSON.—No use to discuss that, it is merely for the jury. The Court has ruled on that.

Q. Do you recognize those as taken on the 24th, and the other being the right and one of them the left leg. Is there anything abnormal in either of these pictures?

A. There is not enough difference of one from the other to show anything abnormal.

Q. That is, you would not, if you recognized an epiphyseal separation difference of one-sixteenth inch, you would not say that there is enough variance to suggest an abnormal condition?

A. What might appear in one plate may be  $1\frac{1}{4}$ ",



(Testimony of L. L. Sexton.)

taking into consideration the angle in which it was taken, and unless both pictures were taken at the same angle a person would not be able to say absolutely that there was any difference.

Q. Then you mean, Doctor, do you that because those photographs are not identical you cannot say by a comparison that an abnormal condition exists there?

A. I know enough about these pictures and other pictures that I have seen to know that every one little bit more would bring it back that much, or absolutely alike.

Q. You mean to say that if there was a difference in the tubercle separation there of a  $1/16''$  that you would not see it from those photographs?

A. I think you would.

Q. You will say that there is not that difference?

A. There is not.

Q. You pointed out to the jury that in one of these that is in the 1014 one, there is a separation that seems to be direct toward the outer surface and that does not appear in the right? A. Yes.  
[306—167]

Q. Would that suggest to you some point of inquiry? That there may be something wrong there?

A. I know it was taken on a little different angle, if you turned it around that crack would show like this one.

Q. Now, Doctor, is it not a fact that that separation in 1016, a little wider than the separation in 1015 or in 1014?

(Testimony of L. L. Sexton.)

A. The amount of dark area that you can see there is greater, but the separation of the tubercle from the shaft is not any greater.

Q. And the reason for that is account for by the fact that it was taken from a different angle?

A. Yes.

Q. Is this true that if one sought to reconcile a condition of one leg with a condition of another because of the difference of  $1/16''$ , it could be easily accounted for by the difference in the angle?

A. Yes.

Q. Is it not a fact, Doctor, that you, in giving your opinion upon this matter, you were seeking, honestly so, a—to effect a reconciliation of those two photographs? A. Yes.

Q. Now you say, Doctor, that you never heard, or rather that you know that a separation, tubercle separation, or a tubercle epiphyseal separation is ordinarily and usually cured in a few weeks?

A. That is what the authorities say.

Q. Now you also say, Doctor, that it is not true that if it is not cured within a course of a few weeks, that it can't be cured until the age of between 20 and 24?

A. I can't see any reason for a statement of that kind. [307—168]

Q. Now, this has been referred to as a partial separation of the epiphysis, now a complete separation is a much more serious thing is it not?

A. Yes.

Q. Can you see any reason why with a complete

(Testimony of L. L. Sexton.)

separation of the epiphysis, that if it is not cured in a few weeks it cannot be cured at all

A. That is another proposition altogether.

Q. Is that probable?

A. It depends on how much separation and how much overlapping there is; it depends on a great many things, and how formidable the fracture is.

Q. And if that is not cured in a matter of a few weeks that it cannot be cured, if there are evidences of a partial separation of the epiphysis of the tubercle?

Judge STANLEY.—I object to the question.

Judge THOMPSON.—The Court overrules the objection.

Judge STANLEY.—Note an exception.

A. That it cannot be cured in a few weeks—the upper epiphysis of the tibia. I believe that it can never be cured or not—I have never seen a case. I don't know whether that would be so or not. It would take a great deal longer and probably would be a long time.

Q. As a matter of fact is it not a fact that a complete separation of the epiphysis is a fatal injury?

A. I don't believe that it is a permanent—that it is usually fatal.

Q. (Mr. RUSSELL, reading from book, Keene's surgery.) Sometimes fatal, often fatal; sometimes causes death; does not fatal mean death?

A. It means causing death.

Q. Can you cut the leg off and save the rest of the body? [308—169]

(Testimony of L. L. Sexton.)

A. I presume by that statement that the separation would be of the entire epiphysis, would be as a railway train running over the bone and it is taken off at that point; there are other conditions along with it though.

Judge STANLEY.—I object to this line of examination, if the Court please; counsel holds a book in his hands and has cited that this separation is a serious and often fatal injury, and uses some other language.)

Q. I will have to ask you this question, I want to be fair to the witness: Is it not a fact that the separation of the upper epiphysis of the tibia is like—is a serious and often fatal injury?

A. I believe you are reading.

Q. By fatal injury, that is an injury that cannot be cured?

A. The medical term fatal injury means causes death.

Q. In your opinion would the separation of the epiphysis be a fatal injury, complete separation, would that cause death?

A. I would not have thought so unless, I would not have thought as formidable a thing as that, as it takes an awful shock to tear it loose; it probably refers it to—

Q. Now, Doctor, not knowing whether it is out of the book or not, or any other source, what is your professional opinion.

Judge THOMPSON.—We will settle the question but you both were *both* dodging around the question.



(Testimony of L. L. Sexton.)

Q. Doctor, is it not a fact that within the past two or three years, that treatments in connection with injuries to the joints, fractures, has been revolutionized to a considerable extent? A. Yes.

Q. Do you ever read De Page's works? [309—170] A. Not that I recall.

Q. Do you recognize him as a recognized authority? A. Yes, I have read extracts of his works.

Q. Does he not advocate greater mobility of joints and injuries, and injured legs, greater mobility of the joints than was prescribed by physicians of the older school?

A. Oh, yes. All of the surgeons are getting around that way all the time.

Q. The treatment resorted to by the surgeons, is considered very good is it not, Doctor?

A. Yes.

Redirect Examination of Witness by Judge  
STANLEY.

Q. You said, Doctor, that it was not your purpose in examining these plates and making comparisons to go out of your way, to look for reconciliations as between the right and left photograph that—

Mr. RUSSELL.—I object if your Honor please. I submit there was no such statement.

Judge THOMPSON.—I sustain the objection.

Q. (Mr. RUSSELL.) In that connection, Doctor, are you not here under pay of the defendant?

Judge THOMPSON.—You need not answer that question.



(Testimony of L. L. Sexton.)

Mr. RUSSELL.—One of the questions to show bias of witness.

Mr. RUSSELL.—I note an exception.

Q. Not all injuries to bone would show in an X-ray would they? A. I believe they all will.

Q. Without regard to the method of taking the photograph?

A. No. If the photograph is not taken properly it may conceal a part or even a slight injury, or all of the injury to the part. [310—171]

Q. In other words, photographs are taken with a view to have such photograph show that particular part suspected? A. Yes.

Q. By whom, Doctor, were the photographs taken, the plates numbered 1014, 1015 and 1016 and 1017? A. They were taken by my operator.

Q. Who is that? A. Alfred Souza.

Q. Doctor, you say that Le Page and all of the modern schools of doctors, recommend greater mobility of joint than the older schools? A. Yes.

Q. Do any of them recommend the treatment which you have stated here was not only not regarded as right but was regard as wrong?

A. I don't believe they do.

Judge THOMPSON.—Have you any other witnesses, Judge Stanley.

Judge STANLEY.—I intended to call Dr. Irwin, but he was called over to Waimea and will not return until half past eleven to-night.

Judge THOMPSON.—How long will you probably take to get through with the defendant's case?

Judge STANLEY.—He will be my last witness.

Mr. RUSSELL.—We have nothing for rebuttal, don't think so, unless Dr. Irwin should surprise us. If the Court please, Dr. Irwin was in court to-day; we would like to finish this case this evening, as we have a case set in the Supreme Court for Saturday, and we would like to finish this case so that we can arrange to leave for Honolulu by to-morrow morning's "Mauna Kea."

Mr. PATTERSON.—If the Court please, when Dr. Irwin was [311—172] here this morning he did not know anything about being called to Waimea.

Judge STANLEY.—If the Court please, Mr. Patterson brought the note to me and knew what it contained.

Mr. PATTERSON.—I will state that Judge Stanley went up to your Honor's desk with the note, and I knew not what it contained, and he did not show it to me.

Judge STANLEY.—If your Honor please, it is not usual to have medical men who are engaged in treating the sick to be in attendance on the Court at all times, and for this reason I did not subpoena Dr. Irwin, but to bring them into court whenever they are needed to testify. I ask that we stand adjourned from twenty minutes to six until nine o'clock to-morrow morning for the purpose of enabling me to call the witness Dr. Irwin to the stand.

Mr. PATTERSON.—That doctor was in court this morning.

Mr. RUSSELL.—What do you expect with Dr. Irwin.

Judge STANLEY.—Practically the same as Dr. Sexton. It would be along the same lines and I am perfectly willing to say and I expect him to testify along the same lines as Dr. Sexton has testified.

Judge THOMPSON.—Mr. Patterson, when is your case set for in the Supreme Court?

Mr. PATTERSON.—At 10 o'clock on Saturday, and I leave by to-morrow's boat.

Judge THOMPSON.—Gentlemen, I don't believe that I have been as indulgent before, and I promise not to be again. See what trouble it gets the Court in. I am expected to rule and the matter will go to the Supreme Court for final hearing. Condemnation falls on the Court one way or the other. The Court is not to blame. [312—173]

The difficulty could be avoided if counsel will admit that the testimony which Dr. Irwin will give will be the same as testified to by Dr. Sexton, and of the same general effect as Dr. Sexton would so testify.

Judge STANLEY.—With that admission I am ready to go on when your Honor says so.

Mr. RUSSELL.—Then may I make this statement: If the defendant will admit that if Dr. Irwin was called as a witness he would testify to the same effect as Dr. Sexton, and we will have no rebuttal.

Judge STANLEY.—We admit that his testimony would be the same as Dr. Sexton's. [313—174]

Territory of Hawaii,  
Fourth Judicial Circuit,—ss.

I hereby certify that the foregoing is a true, complete and accurate transcript of my stenographic notes of the testimony, objections, rulings, exceptions, motions, etc., in the above-entitled cause.

GEORGE K. MILLS.

Acting Official Reporter, Circuit Court of the Fourth  
Judicial Circuit, Territory of Hawaii.

[Endorsed]: 15 L. No. 791. Doc. 3, pg. 213.  
Margaret Fraga, by Alfred Fraga, Her Guardian  
*ad Litem*, vs. Hoffschlaeger Co., Ltd. Transcript  
of Evidence. Filed at 10 o'clock A. M. August 4,  
1921. T. J. Ryan, Clerk. No. 1360. Rec'd and  
filed in the Supreme Court, December 17, 1921, at  
9:50 A. M. J. A. Thompson, Clerk. [314]

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In the Circuit Court of the Fourth Judicial Circuit,  
Territory of Hawaii.

DAMAGES.

MARGARET FRAGA, by ALFRED FRAGA,  
Guardian ad Litem,

Plaintiff,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant.



**Defendant's Bond on Motion for New Trial and on Appeal.**

(Under Sections 2535-2538, R. L. 1915.)

KNOW ALL MEN BY THESE PRESENTS: That Hoffschlaeger Company, Limited, an Hawaiian corporation, as principal, and Hartford Accident and Indemnity Company, a corporation duly organized under the laws of the State of Connecticut (authorized to do a surety business in the Territory of Hawaii, and having its Honolulu office with the American Factors, Limited, in Honolulu, in said Territory) as Surety, are held and firmly bound unto James A. Thompson, Esquire, Clerk of the Supreme Court of the Territory of Hawaii, and his successors in said office, in the sum of Seven Thousand Five Hundred Dollars (\$7,500) to be paid to the said Clerk or his successors in said office, for the benefit of such person or persons as may be entitled to a recovery hereunder, for the payment of which, well and truly to be made, they do hereby bind themselves and their respective successors jointly and severally, firmly by these presents.

Signed and sealed at Honolulu, Territory of Hawaii, the [315] 3d day of June, 1921.

THE CONDITION of the above obligation is such that whereas the above-named Margaret Fraga, as plaintiff in the above-entitled action, has recovered a judgment therein against the said Hoffschlaeger Company, Limited, as defendant, in the



sum of **Seven Thousand Five Hundred Dollars** (\$7,500) upon the verdict of a jury rendered in said action, on the 27th day of May, 1921, and the said defendant, named as principal on this bond, has filed or is about to file a motion for a new trial of said action and to file and prosecute a bill of exceptions or writ of error in said action, to the Supreme Court of the Territory of Hawaii, and desires a stay of execution pending the said proceedings on appeal:

NOW, THEREFORE, if the said Hoffschlaeger Company, Limited, as defendant and appellant as aforesaid shall pay all costs of the said motion for a new trial in case the same shall not be sustained, and all costs which shall or may subsequently arise or otherwise accrue and be awarded against it in said action or on said appeal, until the final termination thereof, and pay such final judgment as may be recovered against it in said cause, and shall not, to the detriment of said plaintiff or obligee in this bond remove or otherwise dispose of any property it may have liable to execution, and in all other respects abide by and perform such final judgment as may be entered in said cause, then this obligation shall be void; otherwise the same to remain in full force and virtue.

IN WITNESS WHEREOF said principal and surety herein named have caused this instrument

to be duly executed in their corporate [316]  
names and behalf on this 3d day of June, 1921.

HOFFSCHLAEGER COMPANY, LIMITED

By H. G. DANFORD, (Seal)

Its Vice-President.

By HANS M. GITTEL,

Its Scty. & Treas.

HARTFORD ACCIDENT AND INDEM-  
NITY COMPANY.

By SHERWOOD M. LOWREY.

The amount of the penalty and the sufficiency of  
the surety of the foregoing bond are hereby ap-  
proved this 14th day of Nov. 1921.

J. W. THOMPSON,

Acting Judge Circuit Court, Fourth Circuit.

[Seal]

Attest: A. K. AONA,

Clerk, Circuit Court, Fourth Circuit.

[Endorsed]: 13 L. No. 791. Doc. 3, pg. 213.  
Circuit Court, Fourth Circuit, Territory of Hawaii.  
Margaret Fraga, by Alfred Fraga, Guardian *ad*  
*Litem*, Plaintiff, vs. Hoffschlaeger Company, Ltd.,  
Defendant. Defendant's Bond on Motion for New  
Trial and on Appeal. Dated: ———, 1921. Filed  
3:16 o'clock P. M., June 6, 1921. T. J. Ryan, Clerk.  
C. F. Parsons and Smith, Warren & Stanley, At-  
torneys for Defendant. No. 1360. Rec'd and filed  
in the Supreme Court December 17, 1921, at 9:50  
A. M. J. A. Thompson, Clerk. [317]

In the Supreme Court of the Territory of Hawaii.  
October Term, 1921.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,

vs.

HOFFSCHLAEGER COMPANY, LIMITED.

ERROR TO CIRCUIT COURT, FOURTH CIR-  
CUIT.

Hon. J. W. THOMPSON, Judge.

Argued August 4, 1922.

Decided September 13, 1922.

PETERS, C. J., EDINGS and PERRY, JJ.

Statutes—Constitutionality—Substitute Judges.

Section 2277, R. L. 1915, which provides that the Chief Justice of the Supreme Court may, in the case of a vacancy in the office of Circuit Judge of one of the circuits authorize a Circuit Judge of another circuit to preside at the trial of any pending cause, is not in conflict with Sec. 80 of the Organic Act, which provides that the President shall nominate and by and with the advice and consent of the Senate appoint the Judges of the Circuit Courts.

New Trial—Misconduct of Jurors—Newspaper Comments.

Not every newspaper publication relating to a case on trial furnishes ground for a new trial.

The result must depend upon the circumstances of each particular case.

Same.

A newspaper publication to the effect that the defendant corporation in a pending action for damages for negligence is protected by accident insurance and that the insurance company offered to settle for a small amount, which article [318] was published without the direction or knowledge of the plaintiff or her attorneys, is not *per se* ground for a new trial or for the entry of a mistrial.

**Trial—Withdrawal of Juror—Discretion of Trial Court.**

A motion to withdraw a juror and to enter a mistrial is in the sound, judicial discretion of the Trial Judge and his ruling thereon will not be disturbed in the absence of an abuse of discretion.

**Evidence—Opinion—Standard Treatises—For Purposes of Contradiction.**

Where an expert witness gives in evidence his opinion as to the probable length of time that will elapse before a patient will recover from injuries received in an accident and in cross-examination names certain authors as supporting his opinion, it is not error for the trial judge to refuse, on the cross-examiner's request, to order the witness to leave the courthouse, procure the books referred to, return to the stand and search for and point out the passages supporting his opinion,—the witness and



opposing counsel offering to place the books at the cross-examiner's disposal and to permit a recall of the witness at any time for further cross-examination.

Negligence—Contributory    Negligence—Care    Required.

A girl of thirteen cannot be said, as a matter of law, to be guilty of contributory negligence merely because, while walking on a sidewalk adjoining a public highway, she permitted her attention to be momentarily diverted to the opposite sidewalk by the voice or call of another person and in consequence of this distraction fell into a freight elevator pit left by the defendant open and unguarded. [319]

### **Opinion of the Court by Perry, J.**

This is an action for damages for the negligence of the defendant corporation resulting in physical injuries to the plaintiff. The jury rendered a verdict in favor of the plaintiff for the sum of \$7,250. The case comes to this court on a writ of error. The more important assignments of error will be considered in detail.

The case was tried in Hilo in the Fourth Judicial Circuit of this Territory at a time when a vacancy existed in the office of Circuit Judge of that circuit. The trial was presided over by the Honorable J. W. Thompson, Judge of the Circuit Court of the Third Judicial Circuit, upon the written request and authorization of the Chief Justice of this court. One assignment of error is that this request and authorization were invalid because, as it is said, the statute



purporting to provide for such temporary grants of authority is in conflict with the Organic Act of the Territory and therefore void. The statute under which the chief justice acted in requesting Judge Thompson to "preside at the trial of any cause or causes pending in the circuit court of the fourth circuit" is R. L. 1915, section 2277, which reads as follows: "Whenever on account of disqualification, inability to attend, vacancy in office, or any other cause or causes, there shall be no judge of the circuit court of any particular circuit who can preside at the trial of any cause pending in such court or in chambers in such circuit, or at any term of such court, a Circuit Judge of some other circuit who shall be thereto authorized by the written request of the Chief Justice, may preside at the trial of such cause, or at such term, as the case may be." It is not contended that the Chief Justice's request and authorization to Judge Thompson were not in pursuance of, or in conformity with, the provision of this statute. The only contention is that the statute is in contravention of section 80 of the Organic Act, which reads as follows: "That the [320] President shall nominate and, by and with the advice and consent of the Senate, appoint \* \* \* the Judges of the Circuit Courts, who shall hold their respective offices for the term of four years, unless sooner removed by the President." In our opinion the objection is not well founded. In acting as he did the Chief Justice did not appoint or endeavor to appoint any one as a Judge of the Circuit Court of the fourth

circuit; nor does section 2277 purport to authorize the appointment of a judge of any circuit in case of a vacancy. All that the statute purports to do is, and all that the Chief Justice did under that statute was, to authorize a Judge of another circuit, who was duly appointed to his office by the President and Senate of the United States, to temporarily perform certain duties within the ordinary territorial jurisdiction of the fourth circuit. The statute and the designation by the Chief Justice both recognize that a vacancy exists in the fourth circuit and both proceed upon the theory of such vacancy. Neither attempts to provide for or to make an appointment of a Judge of the fourth circuit. Neither purports or attempts to in anywise limit the powers granted by section 80 of the Organic Act to the President or to the Senate of the United States. Both proceed upon the assumption that in due course the power of appointment referred to in section 80 of the Organic Act will be exercised by those who are by that act vested with the power so to do. There is no conflict between R. L., section 2277, and section 80 of the Organic Act.

On the afternoon of the first day of the trial before the jury a newspaper published in Hilo published an article reading as follows:

**“FOURTEEN-YEAR-OLD HILO GIRL SEEKS  
\$11,500 DAMAGES FROM INSURANCE  
FIRM FOR INJURIES.**

“Pretty Miss Margaret Fraga, fourteen-year-old Hilo school girl, fell down a sidewalk elevator shaft,

owned by the Hoffschlaeger Company, Ltd., last August. [321]

“When her case was called in the Circuit Court this morning she asked for \$11,500 damages for injuries which she declares she suffered from her fall, from which she declares that she has never entirely recovered.

“Shortly before noon, the trial jury was completed and the beginning of testimony will start when court convenes this afternoon.

“Unusual Circumstances.

“The circumstances surrounding the cases are rather unusual. According to the Insurance company, which is defending the case for the defendant, it is admitted that Miss Fraga was walking along Keawe Street and fell down the elevator shaft, but they declare that the complainant did not suffer serious injuries. It is reported that the Insurance company, at the time of the accident, agreed to settle for a small amount of damages. It is admitted that half of the iron grating, which was supposed to cover the shaft, was left unguarded.

“Miss Fraga declares that her injuries, both physical and mental, were so serious that she has not entirely recovered. The twelve men who were selected to hear the evidence in the case are as follows: James Davis, George H. Akau, John Kahiawi, Antone J. Kimi, James Kauhulapua, Charles Johnson, T. O. Mitchell, E. B. Hamauku, A. Arasuda, S. K. Maka, E. A. Namohala and Harry Hapai.

“Questions Jurisdiction.

“Judges William L. Stanley and Charles F. Par-

sons are appearing for the Insurance Company, who are shouldering the responsible for the Hoffschlaeger Company. It is expected that this case will require two days.

“Yesterday, when the case was first called, Judge W. L. Stanley filed a motion that Judge Thompson had no jurisdiction to hear this case. The motion was overruled and the case was continued until this morning.”

On the first day of the trial evidence had been presented to the jury after the noon recess only. Upon the opening of court on the second day of the trial counsel for the defendant presented a motion for the withdrawal of one juror and for the entry of a mistrial, basing his motion upon the ground of the newspaper publication of the article above quoted. Affidavits for and against the motion was filed and the motion was denied by the presiding Judge and the trial proceeded. After verdict for the plaintiff the defendant in support of a motion for a new trial, based *inter alia* upon this same ground of the appearance of the publication in the local paper, presented additional affidavits upon the subject. The motion for a new trial was denied by the presiding Judge. [322]

In support of the errors assigned in connection with the denial of these two motions it is contended that the publication of the article was prejudicial to the defendant in that the article states, first, that an insurance company was the real defendant and was “shouldering” defendant’s case and the responsibility involved, and, second, that the insur-



ance company had agreed to settle the claim of the plaintiff for a small amount of damages.

It is well settled that not every newspaper publication relating to a case on trial furnishes ground for the granting of a new trial. The result must depend upon the circumstances of each particular case including the nature of the article and the prejudice which it is likely to have caused to the losing party. It cannot be doubted that if in the case at bar the publication had been made prior to the impaneling of a jury for the trial of the case and if under those circumstances the prospective jurors had been examined on their *voir dire*, as to the reading of the article, as to the impressions that it made upon them and as to whether or not they were able to discard those impressions, if any, and to try the case solely upon the evidence as it should be adduced at the trial and upon the law as it might be given to them by the presiding Judge, and had answered, satisfactorily to the Court, that either the article had not been read or had left no consequential impression upon them or that they could discard those impressions, and try the case solely upon the law and the legal evidence, no juror thus answering satisfactorily could have been successfully challenged. Under those circumstances every such juror would be perfectly eligible to sit at the trial of the case. Intelligent jurors throughout the land are presumed to read newspapers and to read in them not only other current news but also reports of accidents and other facts involved in controversies which may later become the sub-



ject of judicial investigation. No one [323] is in this jurisdiction successfully challenged nowadays on the mere ground that he has read something in the newspapers relating to the case on trial. 20 R. C. L., p. 254, sec. 36; 2 Thompson on Trials, sec. 2561. The examination is always pursued further to ascertain whether in spite of the reading the proposed juror is able to give both parties a fair trial purely upon the law and the evidence. In the case at bar the defendant did not avail itself of the opportunity, which it had in conformity with correct and well-recognized procedure, to ask at the opening of the second day's session of the court that the trial be suspended and the jurors re-examined in order to ascertain how many, if any, of them had read the article in question, how many, if any, had received from the article impressions as to the merits of the case on trial and how many, if any, were not able to sit with unprejudiced minds in the further trial of the case. *Marrin vs. United States*, 167 Fed. 951, 953; *Lindsey vs. Tioga Lumber Co.*, 32 So. (La.) 464, 466; *Copeland vs. Ry. Co.*, 75 S. W. (Mo.) 106, 114, 115; *State vs. Hoffman*, 45 So. (La.) 951, 955. Most, if not all, persons available as jurors nowadays are familiar with the business practice of corporations and individuals of securing themselves against loss from accidents due to the negligence of themselves and of their servants and agents by taking out insurance with companies existing for the purpose. It would not be good ground for challenge of a proposed juror that he knew or had read in advance of the trial

that the defendant in any given case was thus secured by insurance provided he could answer with satisfaction to the Court that he could easily obey the instructions of the Court that that fact should not affect his verdict one way or the other. Similarly, as to a published suggestion that a compromise had been offered, whether that suggestion stands by itself or in combination with a reference to insurance. In the case at bar the defendant had the opportunity already adverted to [324] to re-examine the jurors as to their knowledge of their duty in this respect. We venture to say that in all probability had such an examination been had it would have been found that the jurors understood their duty in the premises and were qualified to continue sitting as jurors in spite of the fact that they had read the article in question. It is worthy of note in this connection that although a period of two weeks elapsed from the appearance of the article until the filing of the motion for a new trial the defendant was unable to show that more than one juror had read the article during the trial or that that juror had been influenced by what he read. To permit a losing party to content himself with a mere motion to withdraw a juror and to enter a mistrial, without an immediate examination of the jurors to ascertain their state of mind due to the appearance of the newspaper article, would be to encourage him to take chances on the verdict of the jury, preserving an exception based upon a supposed state of facts not as clearly disclosed by any means as it might have been had there been an im-

mediate examination of the jurors. As was said in *Partello vs. Missouri Pacific Ry. Co.*, 145 S. W. (Mo.) 55, 58: "It was competent for the defendant to have shown then, by an examination of the jurors, whether or not an opinion had been formed, or whether the jurors had been or would be influenced by having read the newspaper article. This the defendant did not do and it would not do to permit a party to take the chance of a favorable verdict and failing in that to claim the existence of prejudice of jurors which he failed to show when he had the opportunity. \* \* \* When the Court made the ruling nothing was shown more than the mere reading of a newspaper article bearing upon the case by two jurors and that alone was not enough to warrant the court in discharging the jury." See also *Shaffer vs. Ry. Co.*, 201 S. W. (Mo.) 611, 615.

It is true that in many cases in New York, Illinois and [325] perhaps other states it has been held that the mere statement, direct or indirect, by counsel to or in the presence of the jury that the defendant is protected by accident insurance is reversible error. This is an extreme view and does not appeal to us as sound. We do not care to follow it. We think that with a possible occasional exception due to particular circumstances ordinary cautionary instructions would cure what otherwise might be error. There are other cases, of course, which hold that cautionary instructions do cure. See for example, *Holt vs. Manufacturing Co.*, 98 S. E. (N. C.) 369, 370, 371. There is a difference worthy

of mention between evidence, offers of evidence and argument adduced in court, on the one hand, and newspaper publications out of court, on the other hand. The latter, it may well be presumed, would not have the same effect upon a jury as the former. *Hollenbach vs. McCord*, 132 S. W. (Mo.) 1189, 1190, 1191. Nor was there any evidence in the case at bar tending to show that the plaintiff or her attorneys or anyone else in her behalf caused the publication in question to be made. The only evidence on the subject is to the effect that the plaintiff's attorney did not cause the publication and the Trial Judge so found as a fact.

A motion to withdraw a juror and to enter a mistrial, even if a correct form of procedure in this jurisdiction, is at best addressed to the sound judicial discretion of the Trial Court. *Marrin vs. United States*, *supra*; Fed. Cas. No. 14,858; *Per-rung vs. Supreme Council*, 93 N. Y. S. 575, 578; *Heiler vs. Storage Co.*, 105 Atl. (N. J.) 233. We cannot find that in denying the motion the Trial Judge in the case at bar abused his discretion. Whether in this jurisdiction a motion of this kind (for the history of this method of procedure, which originated in a fiction, see *Usborne vs. Stevenson*, 48 L. R. A. (Ore.) 432, 435, 438) can be entertained in the absence of reason [326] shown why any particular juror should be excused or should not be permitted to longer serve in the case is a question that need not be decided in this case. For other reasons already stated the motion in this instance was correctly overruled.



The accident in question in this case consisted in the plaintiff's falling into a freight elevator shaft in a sidewalk adjacent to one of the public highways of Hilo. Half of the iron grating or door over the shaft had been left open by the defendant or its servants for the discharge of freight and the opening had been left unguarded and unprotected in any way. The plaintiff was thirteen years of age, had been walking on the sidewalk in the direction of the elevator-pit and a second or two prior to the fall had had her attention diverted to the opposite side of the street by the voice of another. It was during this momentary distraction that she fell. On behalf of the plaintiff the physician who attended her immediately after the accident and for some weeks thereafter testified at length concerning the nature and the extent of her injuries and the probability as to the time that would elapse before she could recover completely from an injury in the general locality of one of the knees. Testifying that as complete recovery had not happened within a stated time (three or four weeks) he gave it as his opinion that she would not recover until some time between her twentieth and twenty-fourth year of age. Pressed on cross-examination for reasons in support of these views, he named certain writers of medical works as authorities in support of his opinion. Counsel for the defendant thereupon asked the witness to produce the books written by these authors, which he (the witness) had said were at his home or at his office in Hilo, and asked the Court for an order compelling the



witness to obtain and produce these books in order that counsel for the defendant might ask the witness to point out the passages [327] supporting his testimony. The motion was denied and the request disallowed. At that time, however, the witness informed counsel for the defendant that the books at his home and office were at counsel's disposal and counsel for plaintiff made the offer, and asked that it be placed of record, that the plaintiff would consent to the recall of the witness at any time by counsel for the defendant for further cross-examination. In so far as the record shows none of these offers was availed of by counsel for the defendant. No offer was subsequently made in court to show from the books that they did not support the witness' opinion or that they contained passages to the contrary.

The refusal of the Court to order the witness to procure the books at his home or office and to produce them to counsel for further cross-examination is assigned as error. This assignment cannot be sustained. The general rule seems to be well settled that medical books are not admissible as evidence of the truth and correctness of the statements and views therein contained. 8 Ency., Pleading and Practice, 768, 769; 3 Wigmore on Evidence, sec. 1700; 22 C. J., sec. 831. It seems to be equally well settled that when a medical expert cites a book as authority for his statement passages in the book to the contrary may be shown him in cross-examination and further questions asked of the witness which are intended to bring forth an admission

that the witness was in error. Same authorities. But counsel in the case at bar sought to go further than this. He did not produce any books, he did not confront the witness with any passages in conflict with his testimony, but he sought to have the witness compelled to leave the stand and proceed to his home or office to obtain the books, return with them to the courthouse and then to search for passages tending to confirm the opinions advanced by him in evidence. The most that can be said in favor of the defendant [328] in this respect is that the matter was at best in the discretion of the Trial Judge and that that discretion having been exercised in the way that it was no reversible error is to be found in the ruling.

Another assignment of error is that upon the undisputed evidence the plaintiff was guilty of contributory negligence in permitting her attention to be distracted to the opposite side of the road and in not at all times keeping her eyes fixed on the sidewalk ahead of her sufficiently to discover the opening which was there. The evidence is indeed undisputed on this point. The plaintiff was a minor thirteen years of age. She had often passed along this same sidewalk and had seen the freight elevator and its covering. It was during the momentary diverting of her attention by the call from the opposite sidewalk that she fell. The degree of care required of a child is different from that required of an adult. A child is "only required to use the care appropriate to his age, experience and mental capacity." *Ry. Co. vs. Heaton,*

191 Fed. 24, 26. See, also, *Long vs. Ry. Co.*, 162 Ia. 11, 21. The degree required of a bright, intelligent child is perhaps different from that required of one less favorably endowed in these respects. The degree of care required of a child of eight is different from that required of a minor of thirteen or sixteen. Common sense and common experience must be resorted to by jurors in determining questions of negligence in the case of minors as well as in the case of adults. It certainly cannot be said that upon the undisputed evidence in this case the jury should have found as a matter of law that the plaintiff was guilty of contributory negligence. It is at least open to grave doubt that if by its verdict the jury had found that the plaintiff was guilty of contributory negligence such a verdict could stand; but certainly a verdict finding her not guilty of negligence cannot be set aside on the ground that it was contrary to the evidence or lacking in evidence to support it. [329]

It is further assigned as error that the verdict was excessive and that it must have been due to bias and prejudice on the part of the jury. The latter part of this contention has reference merely to the newspaper publication and that is already disposed of above. If the jury accepted as true the evidence of Dr. Osorio, who testified on behalf of the plaintiff as to the nature and extent of her injuries,—and it was competent for the jury to do so and to disregard the evidence of another medical expert who testified to the contrary—a verdict in the sum of \$7,250 cannot be held to be excessive or

to contain evidence within itself that it must have been the result of bias or prejudice.

There are other assignments of error relating to so-called restrictions of the right of cross-examination and to the instructions of the Court. Suffice it to say that we have examined them all with care and find no reversible error.

The judgment is affirmed.

W. L. STANLEY (SMITH, WARREN, STANLEY & VITOUSEK, on the brief), for plaintiff in error.

R. J. O'BRIEN and FRED PATTERSON (also on the brief), for defendant in error.

E. C. PETERS.

W. S. EDINGS.

ANTONIO PERRY.

[Endorsed]: No. 1360. Supreme Court, Territory of Hawaii. October Term, 1921. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, vs. Hoffschlaeger Company, Limited. Opinion. Filed September 13, 1922, at 1:55 P. M. Robert Parker, Jr., Deputy Clerk. [330]



In the Supreme Court of the Territory of Hawaii.  
October Term, 1921.

Error to Circuit Court Fourth Circuit.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,  
Plaintiff-Defendant in Error.  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Judgment.**

In the above-entitled cause, pursuant to the opinion of the above-entitled court rendered and filed on the 13th day of September 1922, the judgment is affirmed.

Dated, Honolulu, T. H., October 27th, 1922.

By the Court:

[Seal]

ROBERT PARKER, Jr.,  
Deputy Clerk Supreme Court.

Approved:

A. P.

[Endorsed]: No. 1360. Supreme Court, Territory of Hawaii. October Term, 1921. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Judgment. Rec'd and filed in the Supreme Court Oct. 27, 1922, at 3:35 o'clock P. M. Robert Parker, Jr., Deputy Clerk. [331]



In the Supreme Court of the Territory of Hawaii.  
October Term, 1921.

Error to Circuit Court, Fourth Circuit.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff-Defendant in Error.

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Notice of Judgment.**

To the Honorable Judge of the Circuit Court of  
the Fourth Circuit, Territory of Hawaii.

You will please take notice that in the above-entitled cause the Supreme Court has entered the following Judgment:

**“JUDGMENT.**

In the above-entitled cause, pursuant to the opinion of the above-entitled court rendered and filed on the 13th day of September, 1922, the judgment is affirmed.”

Dated, Honolulu, T. H., October 27th, 1922.

By the Court:

[Seal]

ROBERT PARKER, Jr.,  
Deputy Clerk Supreme Court.

The form of the foregoing notice is hereby approved and it is ordered that the same issue forthwith.

Dated, Honolulu, October 27th, 1922.

ANTONIO PERRY,  
Justice Supreme Court.

[Endorsed]: No. 1360. Supreme Court Territory of Hawaii. October Term, 1921. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited. Notice of Judgment. Rec'd and filed in the Supreme Court Oct. 27, 1922, at 3:35 o'clock P. M. Robert Parker, Jr., Deputy Clerk.  
[332]

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In the Supreme Court of the Territory of Hawaii.  
October Term, 1922.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Petition for Writ of Error and Supersedeas.**

To the Honorable Chief Justice of the Supreme  
Court of the Territory of Hawaii:

The above-named defendant, Hoffschlaeger Company, Limited, petitioner in the above-entitled cause deeming itself aggrieved by the decision and judgment in said cause affirming the judgment of the Circuit Court of the Fourth Judicial Circuit of

the Territory of Hawaii, which judgment of the Supreme Court of the Territory of Hawaii was rendered on the 27th day of October, A. D. 1922, and claiming that there are manifest errors to the damage of the petitioner in the same, which errors are specifically set forth in assignment of errors filed herewith, to which reference is hereby made, comes now by Smith, Warren, Stanley & Vitousek, its attorneys, and hereby respectfully prays that a writ of error be allowed to it in the above-entitled cause and that it be allowed to prosecute the same to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; that an order be made fixing the amount of security the petitioner shall give [333] and furnish upon said writ of error, and that upon the giving of such security all proceedings relative to enforcement and execution of the judgment aforesaid, and all other proceedings whatsoever in said cause in said Supreme Court of the Territory of Hawaii and said circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii, be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court for the Ninth Circuit a transcript of the record, proceedings, exhibits and papers in this cause, duly authenticated, for the correction of the errors so

complained of, and that a citation and supersedeas may issue.

And in this behalf the petitioner shows that the said judgment was rendered in an action at law, and that the amount involved in said action, exclusive of costs, exceeds the sum or value of Five Thousand Dollars.

Dated, Honolulu, T. H., this 13th day of December, 1922.

HOFFSCHLAEGER COMPANY, LIMITED,  
Petitioner,  
By SMITH, WARREN, STANLEY & VITOUSEK,  
Its Attorneys.

City and County of Honolulu,  
Territory of Hawaii,  
United States of America,—ss.

William L. Stanley, being first duly sworn, on oath deposes and says: That he is a member of the firm of Smith, Warren, Stanley & Vitousek, the attorneys of the above-named petitioner Hoffschlaeger Company, Limited; that he has read the foregoing petition and knows its contents and that the matters [334] and things therein set forth are true of his own knowledge, and further that the amount involved in the cause aforesaid, exclusive of costs, exceeds the sum or value of five thousand dollars.

W. L. STANLEY,

Subscribed and sworn to before me this 13th day of December, 1922.

[Seal]

J. A. THOMPSON,  
Clerk of the Supreme Court of the Territory of  
Hawaii.



The foregoing petition is granted, a writ of error allowed, and the bond on said writ of error is fixed at \$8,500.

Dated: December 13th, 1922.

[Seal]

E. C. PETERS,  
Chief Justice.

Due service of the within petition has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 18th day of December, A. D. 1922.

SAMUEL K. PUA,  
Sheriff, County of Hawaii, T. H. [335]

[Endorsed]: No. 1360. In the Supreme Court, Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Petition for Writ of Error and Supersedeas. Filed December 13, 1922, at 10:37 A. M. and Issued for Service. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within petition is hereby admitted this —— day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant  
in Error. [336]



In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFENDANT.  
MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian ad Litem,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Assignment of Errors.**

AND NOW comes the above-named Hoffschlaeger Company, Limited, the defendant-plaintiff in error in the above-entitled cause, and says there is manifest error in the record and proceedings in said cause in the Supreme Court of the Territory of Hawaii, in this, to wit:

1. That said Supreme Court erred in holding that there was no error in the record and proceedings of the Circuit Court of the Fourth Circuit of the Territory of Hawaii on the trial of the cause before a jury entitled "Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff, vs. Hoffschlaeger Company, Limited, Defendant," requiring a reversal of the judgment entered in that court on the 1st day of June, 1921.

2. That said Supreme Court erred in holding that the Trial Judge was not in error in overruling the suggestion of the disqualification [337] of the Honorable J. W. Thompson, Judge of the Cir-

cuit Court of the Third Circuit of the Territory of Hawaii to preside at the trial of the above cause, which was pending for trial before a jury in the Circuit Court of the Fourth Circuit of the said Territory, said suggestion of disqualification having been duly filed by the defendant-plaintiff in error herein on May 23d, 1921, prior to the empaneling of a jury in said cause.

3. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion of the defendant-plaintiff in error duly filed in said cause on May 25th, 1921, for the withdrawal of a juror and the entry of a mistrial in said cause, by reason of the publication, after a jury had been empaneled and sworn and the taking of testimony had commenced, of a newspaper article stating that an insurance company was defending the said cause and other matters prejudicial to the defendant-plaintiff in error and calculated to prevent a fair trial of the said cause.

4. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the defendant-plaintiff in error during the cross-examination of one V. E. M. Osorio, a medical witness called for the plaintiff-defendant in error, that said witness be instructed to produce in court, for the purpose of further cross-examination of said witness in reference to his testimony as to their contents, certain medical books and works of authority mentioned and referred to by him, the said witness, in the course of said cross-examination, some of said books and works being at

the office of the witness and some at his house in Hilo, and the said witness having testified that the plaintiff-defendant in error was suffering from an injury to her left leg, below the [338] knee, known as a partial separation of the epiphysis of the tubercle of the tibia; that such condition might continue until she was between the ages of twenty and twenty-five, and that he could not state anything certain about a complete cure at that time, his testimony on cross-examination being as follows:

“Q. And it was an injury such as you claim the plates in this case of the girl’s left knee show that you were speaking of yesterday, when you said that such an injury heals from three to five weeks?

A. We expect it to heal.

Q. And it is agreed among medical men that it usually heals about that time?

A. It does not. Medical men do not claim that. We expect it to heal in three to five weeks, if it does heal.

Q. What do you mean, Doctor, by the expression you expect it to heal?

A. Well, we expect it to because we figure it to be about the same formation as bone; bone takes three to five weeks to heal, we give it the same time to heal.

Q. Have you any authority for that statement?

A. Sajous; Cunningham; Rose and Carton and De Costa.

Q. Have you any of those authorities here?

A. I have Sajous; De Costa, Cunningham, Rose and Carton.

Q. Will you produce those, Doctor?

A. I will have to go home and get them.

Judge STANLEY.—I ask that witness be instructed to go home and get them, your Honor.”

5. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio that he be instructed to produce in court certain medical books and works of authority mentioned and referred to by him, the said witness, in the course of said cross-examination, for the purpose of enabling the defendant-plaintiff in error to cross-examine him in reference to the testimony given by him as to their contents, and to require the witness while under cross-examination to read or refer to the portions thereof cited by him as authorities for the opinion testified to by him that an injury known as a [339] partial separation of the epiphysis of the tubercle of the tibia does not usually heal until the tubercle becomes bone and is united to the shaft of the tibia, said union occurring between the ages of twenty and twenty-five.

6. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio that he produce in court, for the pur-



pose of further cross-examination of said witness in reference to his testimony as to its contents, a certain surgical work known as De Costa's (a copy of which was at the witness' house in Hilo) mentioned by him on cross-examination as an authority for the opinion testified to by said witness that if an injury such as he testified was suffered by the plaintiff-defendant in error, namely, a partial separation of the epiphysis of the tubercle of the tibia, did not completely heal within three or four weeks, it would serve no purpose to keep the injured part immobile, that the patient might then be permitted to walk, and that by giving the injured part as much rest as possible recovery could not be expected more quickly than when the patient was permitted to walk; the Trial Judge denying the motion for the reason that he had allowed the witness to be examined and cross-examined on his ability as a surgeon.

7. That said Supreme Court erred in holding that the Trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio, to put to him the following question:

“Q. You don't mean, Doctor, that she would get well quicker by being allowed to walk and move, and having some of the force felt on that muscle than she would if she had not been allowed to walk?” [340]

the said witness having testified previously that the muscle or set of muscles chiefly used in extending the leg—the quadriceps femoris uniting in the ten-



don patellae—is attached to that portion of the leg which was in the case of the plaintiff-defendant in error alleged to have been injured, namely, the tubercle of the tibia.

8. That said Supreme Court erred in holding that the Trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

“Q. And is it not a fact, Doctor, that every time that the plaintiff extended her leg the action of the quadriceps tendon tends to enlarge that separation and prevent—”

the said witness having testified that the tendon in said question referred to was attached to that part of the leg alleged in the case of the plaintiff-defendant in error to have been injured, and having further testified that the object a doctor has in view in treating such an injury is to prevent further separation of the tubercle and to allow the tubercle to get back to its normal position.

9. That said Supreme Court erred in holding that the Trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

“Q. I will ask you, Doctor, is it not a fact that if you want to guard against any further separation and allow the tubercle to resume its normal position and allow the patient to recover naturally, you must prevent in some

way all action of the muscles on the injured part?" [341]

10. That said Supreme Court erred in holding that the Trial Judge was not in error in refusing to permit the defendant-plaintiff in error during the cross-examination of the said witness V. E. M. Osorio to put to him the following question:

"Q. You stated, Doctor, I think, that the allowing of the plaintiff to walk about and extend her injured limb would not delay recovery because you expected by counter-irritation, some bone tissue; please explain what you meant."

the said witness having testified previously as follows:

"Q. Is it not a fact that every time she extended her leg that tendon was pulling on the injured part?

A. We expected that by due counter-irritation to have a certain amount of bone tissue to heal it. With that protection she had on, it prevented a complete usage of that muscle that controls that ligament."

11. That said Supreme Court erred in holding that the Trial Judge committed no error during the course of the cross-examination of the said witness V. E. M. Osorio in putting to the said witness and allowing him to answer in the affirmative the following question:

"Q. (By Judge THOMPSON.) Doctor, did you give this girl such treatment as your exper-

ience, your ability, and medical science would dictate, under the circumstances?"

the Trial Judge having immediately prior instructed the witness that he need not answer the following question put to him by the defendant-plaintiff in error:

"Q. Is it not a fact, Doctor, that an injured leg was during the time of your service in the Expeditionary Forces kept in a sling or hammock so that the muscle affecting the injured part would not play upon it?"

the said witness having testified on direct examination that he had served as a surgeon with the United States Expeditionary Force in Europe and had there had considerable experience with fractures, and [342] the defendant-plaintiff in error having excepted to the question put as above by the Trial Judge on the ground that it did not call for the standard of treatment which the law requires.

12. That said Supreme Court erred in holding that the Trial Judge was not in error in refusing to allow the said witness V. E. M. Osorio, during his recross-examination by and at the request of the defendant-plaintiff in error, to examine a medical work known as "Keene's Surgery," which was present in court and which during his redirect examination had been exhibited to the said witness by the plaintiff-defendant in error, identified by the said witness and mentioned by him as an authority during said redirect examination, for the proposition that if an injury such as the plaintiff-defendant in error was alleged to have suffered did not

heal within three or four weeks a recovery could not be expected for some years, and to point out the passage in said medical work to which he, said witness, had reference; and also in refusing to permit the said witness to answer the following question:

“Q. You have cited Keene’s work on Surgery as being an authority for the proposition that if the healing of an injury such as you as plaintiff suffered on August 20th was not effected within three or four weeks it would not heal for years; will you please turn to the passage in Keene to which you have reference?”

the purpose of the proposed cross-examination being to lay the foundation for contradicting and impeaching the testimony of the said witness:

13. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the defendant-plaintiff in error at the conclusion of the recross-examination of the said witness V. E. M. Osorio to strike out all the evidence given by the said witness to the effect that the authorities named by him supported the opinions to which he had testified, on the ground that [343] the defendant-plaintiff in error had not been allowed to cross-examine the witness in regard to said authorities and that the Court had refused to order the production of the books and authorities referred to by the said witness so that the defendant-plaintiff in error might be enabled to cross-examine the said witness in reference to his testimony as to their contents.



14. That the said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the defendant-plaintiff in error at the close of the plaintiff-defendant in error's case that a nonsuit be granted upon the ground that the evidence affirmatively showed such contributory negligence on the part of the plaintiff-defendant in error as to preclude any recovery by her.

15. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

"You are also charged that it is not the law that a person passing along the sidewalk in a city who has no knowledge of any defects therein, is required to be constantly watching for holes in or for obstructions upon, the walk, but he has the right to assume that the walk is in a reasonably safe condition and to act upon that assumption."

16. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

"You are instructed that in the use of the elevator shaft in question the defendant was bound under the law to the exercise of reasonable care and diligence for the safety of such persons as had occasion [344] to use the



sidewalk over said shaft, and it is for you to determine whether in this case the defendant used due diligence to protect the traveling public against falling into this open shaft. And upon the question as to whether defendant exercised reasonable care and prudence in this respect, you may consider the location of this shaft, whether the defendant could expect persons using the sidewalk while the shaft was open, whether or not defendant should have guarded or protected the opening so that persons passing along would not be likely to fall into it, and if so, whether defendant did so guard and protect said opening, and you may consider such other circumstances to be found in the evidence as will have a direct bearing upon this question.”

17. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

“You are instructed that while the plaintiff was bound to use care for her own safety in walking along the sidewalk, the care required of her was not the highest degree of care or prudence, nor was it that degree of care that an unusually cautious man or a man of extraordinary prudence would have exercised, but the degree of care expected of the plaintiff was that which an ordinarily prudent person would have exercised under similar circumstances.

And in this connection you are charged that the fact merely that plaintiff's attention was diverted at the time of the injury does not establish contributory negligence as a matter of law."

18. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

"Upon the question as to whether or not the plaintiff was guilty of contributory negligence in failing to observe the opening into which she fell, you may consider the location of this shaft, the extent to which it covered the sidewalk, whether or not the sidewalk was on a business street, whether or not she acted reasonably in diverting her attention, if her attention was diverted, her age, and such other facts to be found in the evidence bearing upon [345] this issue, and all in the light of the fact that she had a right to assume that the sidewalk was in a reasonably safe condition."

19. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

"You are further instructed that the mere fact that plaintiff knew of the existence of this elevator shaft and failed to avoid it or failed to look for it in passing to determine whether

or not it was open at the time does not render her guilty of contributory negligence as a matter of law and will not as a matter of law preclude her from recovering."

20. That said Supreme Court erred in holding that the Trial Judge was not in error in giving to the jury over the objection of the defendant-plaintiff in error the following instruction requested by the plaintiff-defendant in error:

"The Court further instructs the jury that she (the plaintiff) sued for pain and suffering, which she claims to have sustained. Now, that comes under the general head of pain and suffering. There is no mathematical measure given by law for this. You will ascertain from the evidence, if defendant is liable, how much pain and suffering, mentally and bodily has been undergone by plaintiff, and how much she will undergo, if the evidence discloses it. Then you will find for her what you, as impartial jurors, would find from the evidence to be fairly compensatory to her, but in no event in a sum in excess of the amount of \$11,500."

21. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made by the plaintiff-defendant in error, duly filed on the 6th day of June, 1921, to vacate and set aside the verdict of the jury awarding to the plaintiff-defendant in error against the defendant-plaintiff in error damages in the sum of \$7,250; to vacate and set aside the judgment rendered [346] on said verdict on the 1st day of

June, 1921, and to grant a new trial in said cause.

22. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made and filed by the defendant-plaintiff in error on the 6th day of June, 1921, to vacate and set aside the verdict of the jury and the judgment rendered thereon, for the reason that the defendant-plaintiff in error was during the trial of said cause unduly and improperly restricted in its right of cross-examination of the witnesses called on behalf of the plaintiff-defendant in error.

23. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made and filed by the defendant-plaintiff in error on the 6th day of June, 1921, to vacate and set aside the verdict of the jury and the judgment rendered thereon, for the reason that the evidence showed that the proximate cause of the injury to the plaintiff was her own negligence and further showed her to be guilty of negligence which not only contributed to the accident but without which the same could not have occurred.

24. That said Supreme Court erred in holding that the Trial Judge was not in error in denying the motion made and duly filed by the defendant-plaintiff in error on the 6th day of June, 1921, to vacate and set aside the verdict of the jury and the judgment rendered thereon, for the reason that the damages awarded to the plaintiff-defendant in error were excessive.

25. That said Supreme Court erred in affirming the judgment of the Circuit Court of the Fourth



Circuit of the Territory of Hawaii made and entered on the 1st day of June, 1921, wherein and whereby it was adjudged that the plaintiff-defendant in error should [347] have and recover from the defendant-plaintiff in error the sum of \$7,250, damages, and costs taxed in the sum of \$26.75.

26. That said Supreme Court erred in not vacating and setting aside the judgment of the Circuit Court of the fourth Circuit of the Territory of Hawaii, made and entered on the 1st day of June, 1921, and in refusing to order a new trial of the said cause.

WHEREFORE, said Hoffschlaeger Company, Limited, defendant-plaintiff in error, prays that the judgment of the Supreme Court of the Territory of Hawaii be reversed, and that said Court be ordered to enter a judgment vacating and setting aside the judgment of the Circuit Court of the Fourth Circuit of the Territory of Hawaii, and ordering a new trial of said cause in said Circuit Court.

Dated, Honolulu, T. H., the 13th day of December, 1922.

SMITH, WARREN, STANLEY & VITOUSEK  
Attorneys for Hoffschlaeger Company, Limited,  
Plaintiff in Error.

Due service of the within Assignment of Errors has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and



Territory of Hawaii, this 18th day of December  
A. D. 1922.

SAMUEL K. PUA,  
Sheriff, County of Hawaii, T. H. [348]

[Endorsed]: No. 1360. In the Supreme Court of  
the Territory of Hawaii. Margaret Fraga, by  
Alfred Fraga, her Guardian *ad Litem*, Plaintiff-  
Defendant in Error, vs. Hoffschlaeger Company,  
Limited, Defendant-Plaintiff in Error. Assign-  
ment of Errors. Dated December 13th, 1922. Filed  
December 12, 1922, at 10:37 A. M. and Issued for  
Service. J. A. Thompson, Clerk Supreme Court of  
Hawaii. Returned December 19th, 1922, at 10:00  
A. M. J. A. Thompson, Clerk, Supreme Court of  
Hawaii.

Due service of and receipt of a copy of the within  
assignment of errors is hereby admitted this ——  
day of December, 1922.

\_\_\_\_\_,  
Attorney for Margaret Fraga, Plaintiff-Defendant  
in Error. [349]

In the Supreme Court of the Territory of Hawaii.  
October Term—1922.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error,

**Writ of Error.**

United States of America,—ss.

The President of the United States of America  
to the Honorable Justices of the Supreme  
Court of the Territory of Hawaii, GREET-  
ING:

Because in the record and proceedings, as also in the rendition of judgment in said Supreme Court of the Territory of Hawaii before you, in the case of Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error, manifest errors have happened to the great prejudice and damage of said Hoffschlaeger Company, Limited, defendant-plaintiff in error, as appears by the petition herein,

We, being willing that errors, if any have been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all [350] things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of San Francisco, State of California, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit thirty days after the date hereof, to the end that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 13th day of December, A. D. 1922.

ATTEST my hand and the seal of the Supreme Court of the Territory of Hawaii, at the Clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

J. A. THOMPSON.

Clerk of the Supreme Court, Territory of Hawaii.

Allowed this 13th day of December, A. D. 1922.

[Seal]

E. C. PETERO,

Chief Justice of the Supreme Court, Territory of Hawaii.

Due service of the within Writ of Error has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit:

at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 18th day of December A. D. 1922.

SAMUEL K. PUA,

Sheriff, County of Hawaii, T. H. [351]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Writ of Error. Filed December 13, 1922, at 10:37 A. M. and Issued for Service. J. H. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within writ of error is hereby admitted this — day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant in Error. [352]

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In the Supreme Court of the Territory of Hawaii.  
October Term—1922.

No. 1360.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.



**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States of America to  
Margaret Fraga, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein Hoffschlaeger Company, Limited, is plaintiff in error, and you are defendant in error, and show cause, if any there may be, why the judgment rendered against the said defendant-plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 13th day of December, A. D. 1922.

[Seal]

E. C. PETERS,  
Chief Justice of the Supreme Court, Territory of  
Hawaii.

Due service of the within citation on writ of error has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit, at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County



and Territory of Hawaii, this 18th day of December A. D. 1922.

SAMUEL K. PUA,  
Sheriff, County of Hawaii, T. H. [353]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Citation on Writ of Error. Filed December 13, 1922, at 10:37 A. M. and Issued for Service. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within citation is hereby admitted this —— day of December, A. D. 1922.

\_\_\_\_\_,  
Attorney for Margaret Fraga, Plaintiff-Defendant  
in Error. [354]

\_\_\_\_\_  
In the Supreme Court of the Territory of Hawaii.  
October Term—1922.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS: That we, Hoffschlaeger Company, Limited, a Hawaiian corporation, as principal, and Hartford Accident & Indemnity Company, a corporation duly organized under the laws of the State of Connecticut (authorized to do a surety business in the Territory of Hawaii, and having its Honolulu office with American Factors, Limited, in Honolulu, in said Territory), as surety, are held and firmly bound unto Margaret Fraga in the penal sum of Eighty-five Hundred Dollars (\$8500), for the payment of which, well and truly to be made to said Margaret Fraga, do hereby bind ourselves and our respective successors, jointly and severally, firmly by these presents.

THE CONDITION of the above obligation is such that whereas on the 13th day of December, 1922, the above-bounden principal sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment made and entered in the above-entitled court and cause on the 27th day of October, 1922, by the Supreme Court of the Territory of Hawaii:

NOW, THEREFORE, if the said principal shall prosecute [355] its said writ of error to effect and answer all damages and costs if it fails to sustain its writ of error, then this obligation shall be void; otherwise it shall remain in full force, virtue and effect.

IN WITNESS WHEREOF the said principal and surety herein named have caused this instrument to be duly executed in their corporate names and behalf on this 13th day of December, A. D. 1922.

HOFFSCHLAEGER COMPANY, LIMITED,

By ROBT. F. LANGE,

Its Pres. [Seal]

By HANS M. GITTEL,

Its Secty. & Treasurer.

HARTFORD ACCIDENT & INDEMNITY COMPANY.

By JAS. M. MacCONEL,

Attorney in Fact.

By Attest: E. HUTTON SMITH,

Attorney in Fact. (Seal)

The foregoing bond is approved, and it is ordered that same shall operate and take effect as a supersedeas.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court, Territory of Hawaii.

Dated: Honolulu, T. H., December 18, 1922.

Due service of the within bond on writ of error has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinooole Street, District of South Hilo, County and Territory of Hawaii, this 21st day of December, A. D. 1922.

SAMUEL K. PUA,

Sheriff, County of Hawaii, T. H. [356]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Bond on Writ of Error. Filed December 18, 1922, at 9:58 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 23, 1922, at 9 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within bond is hereby admitted — day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant in Error. [357]

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In the Supreme Court of the Territory of Hawaii.  
No. 1360.

ON ERROR SUED OUT BY THE DEFENDANT.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,

Defendant-Plaintiff in Error.

**Order Extending Time to and Including February  
20, 1923, to File Record and Docket Cause.**

Upon the application of the plaintiff in error and good cause appearing therefor, and pursuant



to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the plaintiff in error, Hoffschlaeger Company, Limited, and the Clerk of this Court, be and they hereby are allowed until and including the 20th day of February, 1923, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record in the above-entitled cause on assignment of errors in this Court, together with said assignment of errors and all other papers required as part of said record.

Dated, Honolulu, T. H., December 19th, 1922.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii.

This order is consented to, December —, 1922.

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Attorney for Defendant in Error. [358]

Due service of the within order extending time for preparation and transmission of record has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 21st day of December, A. D. 1922.

SAMUEL K. PUA,  
Sheriff, County of Hawaii.

Service of the within order is hereby admitted  
this —— day of December, 1922.

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[Endorsed]: No. 1360. In the Supreme Court of  
the Territory of Hawaii. Margaret Fraga, by Al-  
fred Fraga, Her Guardian *ad Litem*, Plaintiff-De-  
fendant in Error, vs. Hoffschlaeger Company,  
Limited, Defendant-Plaintiff in Error. Order Ex-  
tending Time for Preparation and Transmission of  
Record. Filed December 19, 1922, at 3:58 P. M.  
J. A. Thompson, Clerk Supreme Court of Hawaii.  
Returned December 23, 1922, at 9:00 A. M. J. A.  
Thompson, Clerk Supreme Court of Hawaii. [359]

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In the Supreme Court of the Territory of Hawaii.  
No. 1360.

ON ERROR SUED OUT BY THE DEFENDANT.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian *ad Litem*,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,

Defendant-Plaintiff in Error.

**Praeipie for Transcript of Record on Writ of Error.**

To James A. Thompson, Esq., Clerk of the Su-  
preme Court, Territory of Hawaii:

You will please prepare a transcript of the rec-  
ord in the above-entitled cause, to be filed in the  
office of the Clerk of the United States Circuit

Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings, opinions, judgments and papers on file in said cause, to wit:

1. Copy of application for writ of error to Fourth Circuit Court, Territory of Hawaii, filed November 23, 1921.
2. Copy of assignment of errors, filed November 23, 1921.
3. Copy of bond on writ of error, filed November 23, 1921.
4. Copy of praecipe on writ of error, filed November 23, 1921.
5. Copy of acknowledgment of service of notice of application and copy of assignment of errors, filed November 29, 1921.
6. Copy of writ of error.
7. Copy of complaint, filed December 3, 1920.  
[360]
8. Copy of term summons with return of service.
9. Copy of answer of defendant filed January 13, 1920.
10. Copy of suggestion of disqualification filed May 23, 1921.
11. Copy of commission dated March 4, 1921, signed by Chief Justice Jas. L. Coke authorizing Hon. J. Wesley Thompson to preside at the trial of any cause or causes in the Fourth Circuit Court.
12. Decision and ruling on suggestion of disqualification filed May 24, 1921,—Copy of.
13. Copy of motion of defendant for withdrawal of juror and entry of mistrial filed May 25,

- 1921, with exhibit "A" and affidavit of W. L. Stanley attached thereto, filed May 25, 1921.
14. Affidavit of J. W. Russell and Harold Russell, filed May 25, 1921,—Copy of.
15. Copy of counter-affidavits of W. L. Stanley, Karl J. Meinke, filed May 26, 1921.
16. Copy of decision of Judge Thompson on motion for withdrawal of juror and entry of mistrial, filed May 27, 1921.
17. Copy of verdict of jury, filed May 27, 1921.
18. Copy of judgment, filed June 1, 1921.
- Interlineation 19. Copy of motion for new trial with  
1/5/23 Exhibits "A," "B," "C," "D,"  
J. A. T., Clerk "D-1" and "E" attached thereto.  
By permission  
of Chief  
Justice 20. Copy of affidavits of Harold Russell,  
Eugene Banks and Frank J. Cody,  
filed September 27, 1921.
21. Copy of ruling (Hon. H. L. Ross) on motion for new trial, filed November 12, 1921.
22. Copy of order overruling motion for new trial, filed November 19, 1921.
23. Copy of exception to ruling denying motion for new trial, filed November 18, 1921.
24. Copy of plaintiff's requested instructions.
25. Copy of defendant's requested instructions.
26. Copy of clerk's minutes Circuit Court, J. W. Thompson, May 23, 24, 25, 26 and 27, 1921.
27. Copy of transcript of stenographer's notes of evidence adduced at the trial of said cause.  
[361]
28. Copy of bond on motion for new trial filed June 6, 1921.



29. Copy of decision of Supreme Court filed September 13, 1922.
30. Copy of judgment of Supreme Court filed October 27, 1922.
31. Copy of notice of judgment filed October 27, 1922.
32. Copy of petition for writ of error.
33. Copy of assignment of errors.
34. Copy of citation on writ of error and return of service.
35. Copy of bond on writ of error.
36. Copy of order extending time for preparation and transmission of record.

And, in addition, you will please transmit with the foregoing all of the following exhibits:

Plaintiff's Exhibit "A," Lease from Bank of Hilo, Ltd., to Hoffschlaeger Company, Limited, dated October 21, 1918.

Plaintiff's Exhibit "B," X-ray Photographic Plate.  
Plaintiff's Exhibit "C," Photographic Print of X-ray Plate Ex. "B."

Plaintiff's Exhibit "D," X-ray Photographic Plate  
Plaintiff's Exhibit "E," X-ray Photographic Plate.  
Plaintiff's Exhibit "F," Photographic Print of X-ray Plate Ex. "D."

Plaintiff's Exhibit "G," Photographic Print of X-ray Plate Ex. "E."

Plaintiff's Exhibit "H," Photograph of Iron Grating.

Plaintiff's Exhibit "I," Photographic Print of X-ray No. 1014.

Plaintiff's Exhibit "J," Photographic Print of  
X-ray No. 1015.

Plaintiff's Exhibit "K," X-ray Photographic Plates  
No. 1014 and No. 1015.

Plaintiff's Exhibit "L," Photographic Print of  
X-ray Plate No. 1016.

Plaintiff's Exhibit "M," Photographic Print of  
X-ray Plate No. 1017.

Plaintiff's Exhibit "N," X-ray Photographic Plates  
No. 1016 and No. 1017. [362]

You will also annex to and transmit with the record the original writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, and original citation with return of service, your return to the writ of error under the Seal of the Supreme Court of the Territory of Hawaii, and also your Certificate stating in detail the cost of the record and by whom the same was paid.

Dated, Honolulu, T. H., December 13th, 1922.  
SMITH, WARREN, STANLEY & VITOUSEK,  
Attorneys for Plaintiff in Error.

Due service of the within Praecept for Transcript of Record on Writ of Error has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 18th day of December A. D. 1922.

SAMUEL K. PUA,  
Sheriff, County of Hawaii, T. H. [363]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Al-

fred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Praecipe for Transcript of Record on Writ of Error. Dated December 13th, 1922. Filed December 13, 1922, at 10:37 A. M. and Issued for Service. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within praecipe is hereby admitted this —— day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant  
in Error. [364]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFENDANT.

MARGARET FRAGA, By ALFRED FRAGA, Her  
Guardian Ad Litem,

Plaintiff-Defendant in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,

Defendant-Plaintiff in Error.

**Order for Transmission of Original Exhibits.**

To James A. Thompson, Esq., Clerk of the Supreme  
Court of the Territory of Hawaii:

You are hereby authorized and directed, in con-

nection with the writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to transmit as part of the record required by the praecipe of the plaintiff in error the following exhibits, upon its counsel undertaking to return them to the files of this Court, namely:

1. Plaintiff's Exhibit "B," X-ray Photographic Plate.
2. Plaintiff's Exhibit "C," Photographic X-ray Print of Plate Ex. "B."
3. Plaintiff's Exhibit "D," X-ray Photographic Plate.
4. Plaintiff's Exhibit "E," X-ray Photographic Plate.
5. Plaintiff's Exhibit "F," Photographic Print of X-ray Plate, Ex. "D."
6. Plaintiff's Exhibit "G," Photographic Print of X-ray Plate, Ex. "E." [365]
7. Plaintiff's Exhibit "H," Photograph of Iron Grating.
8. Plaintiff's Exhibit "I," Photographic Print of X-ray No. 1014.
9. Plaintiff's Exhibit "J," Photographic Print of X-ray No. 1015.
10. Plaintiff's Exhibit "K," X-ray Photographic Plates No. 1014 and No. 1015.
11. Plaintiff's Exhibit "L," Photographic Print of X-ray Plate No. 1016.
12. Plaintiff's Exhibit "M," Photographic Print of X-ray Plate No. 1017.



Dated, Honolulu, T. H., this 13th day of December, 1922.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Due service of the within Order for Transmission of Original Exhibits has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 18th day of December A. D. 1922.

SAMUEL K. PUA,

Sheriff, County of Hawaii, T. H. [366]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, By Alfred Fraga, Her Guardian *Ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Order for Transmission of Original Exhibits. Dated December 13th, 1922. Filed December 13, 1922, at 10:37 A. M. and Issued for Service. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within Order is hereby admitted this — day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant in Error. [367]

In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFENDANT.

MARGARET FRAGA, by ALFRED FRAGA, Her  
Guardian Ad Litem,

Plaintiff-Defendant 'in Error,

vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Undertaking to Return Original Exhibits.**

To James A. Thompson, Esq., Clerk of the Supreme  
Court of the Territory of Hawaii:

We hereby undertake to return to the files of  
the Supreme Court of the Territory of Hawaii the  
following original exhibits sent to the United States  
Circuit Court of Appeals for the Ninth Circuit, in  
accordance with the order of the Chief Justice of  
the Supreme Court of the Territory of Hawaii:

1. Plaintiff's Exhibit "B," X-ray Photographic Plate.
2. Plaintiff's Exhibit "C," Photographic Print of X-ray Plate Ex. "B."
3. Plaintiff's Exhibit "D," X-ray Photographic Plate.
4. Plaintiff's Exhibit "E," X-ray Photographic Plate.
5. Plaintiff's Exhibit "F," Photographic Print of X-ray Plate Ex. "D."

6. Plaintiff's Exhibit "G," Photographic Print of X-ray Plate Ex. "E."
7. Plaintiff's Exhibit "H," Photograph of Iron Grating.
8. Plaintiff's Exhibit "I," Photographic Print of X-ray No. 1014.
9. Plaintiff's Exhibit "J," Photographic Print of X-ray No. 1015.
10. Plaintiff's Exhibit "K," X-ray Photographic Plates No. 1014 and No. 1015. [368]
11. Plaintiff's Exhibit "L," Photographic Print of X-ray Plate No. 1016.
12. Plaintiff's Exhibit "M," Photographic Print of X-ray Plate No. 1017.

Dated, Honolulu, T. H., December 13th, 1922.

SMITH, WARREN, STANLEY & VITOUSEK.

Due service of the within undertaking for return of original exhibits has been made on Fred Patterson, by leaving with him a copy thereof at his usual place of business, to wit: at his office in the Bradshaw Building on Kinoole Street, District of South Hilo, County and Territory of Hawaii, this 18th day of December A. D. 1922.

SAMUEL K. PUA,

Sheriff, County of Hawaii, T. H. [369]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Undertaking to Return Original Exhibits. Dated December 13th, 1922. Filed December 13, 1922, at 10:37 A. M.

and Issued for Service. J. A. Thompson, Clerk Supreme Court of Hawaii. Returned December 19, 1922, at 10:00 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Due service of and receipt of a copy of the within undertaking to return original exhibits is hereby admitted this — day of December, 1922.

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Attorney for Margaret Fraga, Plaintiff-Defendant  
in Error. [370]

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In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Order Extending Time to and Including April 5,  
1923, to File Record and Docket Cause.**

Upon the application of the plaintiff in error and good cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the plaintiff in error, Hoffschlaeger Company, Limited, and the Clerk of this Court, be and they are hereby allowed



until and including the 5th day of April, 1923, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record in the above-entitled cause on assignment of errors in this Court, together with said assignment of errors and all other papers required as part of said record.

Dated: Honolulu, T. H., February 9th, 1923.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii. [371]

[Endorsed]: No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Order extending Time for Preparation and Transmission of Record. Filed February 9, 1923, at 10:22 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii.

Copy received this 9th day of February, 1923.

FRED PATTERSON,

Atty. for Defendant in Error. [372]

### **Plaintiff's Exhibit "A."**

Law No. 791. Received in Evidence May 24, 1921, and marked Plff's Exhibit "A." Thomas Pedro, Jr., Asst. Clerk.

### **LEASE.**

THIS INDENTURE OF LEASE made and executed upon this 21st day of October, A. D. 1918,

by and between the FIRST BANK OF HILO, LTD., a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, hereinafter called the Lessor, party of the first part, and the HOFFSCHLAEGER CO., LTD., also an Hawaiian corporation, hereinafter called the Lessee, party of the second part,

WITNESSETH:

That the Lessor for and in consideration of the rent reserved, has leased and does hereby lease, let and demise unto the Lessee, all of that portion of the Bank Building which is situate on the North East corner of Waianuenue and Keawe Streets, in the City of Hilo, County and Territory of Hawaii, which portion demised is described as being the two rooms used as stores fronting on Keawe Street, and which are the most Northern rooms of the said Bank Building; together with the basement under each of the two store rooms, and hydraulic elevator and the privileges and appurtenances.

TO HAVE AND TO HOLD the said premises from and after the 1st day of November, A. D. 1918, until the 1st day of April, A. D. 1927.

The said Lessee yielding and paying therefor as rental, monthly during the whole term, the sum of \$100.00, the said amount being payable to the Lessor at its banking house in Hilo, promptly upon the first day of each and every month without demand. [373]

And the Lessor hereby covenants and agrees to and with the Lessee and its permitted assigns that upon the payment of the rent reserved and the ob-

servance of all of the terms, covenants and conditions herein contained, the Lessee may have, use and enjoy said premises during the term hereof without the let or hindrance of any person whomsoever.

And the said Lessee for itself and its permitted assigns hereby covenants and agrees to and with the Lessor that during the term it will pay the said rent reserved at the times and at the place herein before specified without deduction of any kind; that it will neither suffer nor commit any strip or waste of the premises; that it will keep the same in the condition they now are at their own expense; loss or damage by fire or the elements alone excepted, and that they will not assign this lease or sublet or part with the possession of the whole or any portion of the said premises, without first having the written consent of the Lessor;

But the foregoing lease is upon the condition that if the Lessee shall fail to pay the rent reserved at the times and at the place provided or if it shall make breach of any term, covenant or condition herein contained, then the Lessor may re-enter the premises for condition broken and have the same as in its former estate, discharged of this lease; and it is understood and agreed by and between the parties that the receipt by the Lessor of any instalment of rent shall not be construed to be a waiver of any breach of any term, covenant or condition herein contained, except the breach of the covenant to pay the rent so received by [374] the Lessor and that no waiver of any kind shall be

construed to have occurred unless such waiver shall be in writing, signed by the Lessor.

IN WITNESS WHEREOF the parties hereto have hereunto set their names by their respective officers to this and to another instrument of like date and tenor, both of which shall be considered original, upon the day and year first above written.

THE FIRST BANK OF HILO, LTD.

By H. V. PATTEN, (Seal)

Its Cashier.

HOFFSCHLAEGER CO., LTD.

By ROBT. F. LANGE, (Seal)

Pres. & Gen. Mgr.

By \_\_\_\_\_.

Witnessed by JAS. M. MacCONEL.

Territory of Hawaii,

County of Hawaii,—ss.

On this 21st day of October, A. D. 1918, before me appeared H. V. Patten, to me personally known, who, being by me duly sworn, did say that he is the Cashier of the First Bank of Hilo, Ltd., and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said H. V. Patten acknowledged said instrument to be the free act and deed of said corporation.

[Seal]

JOHN ARRUDA,

Notary Public, Fourth Circuit, Territory of Hawaii. [375]

[Endorsed]: Plff's. Ex. "A." Lease. First Bank of Hilo, Ltd. to Hoffschlaeger Co., Ltd.



Dated: October, 1918. Supreme Court, Territory of Hawaii, Honolulu. No. 1360. Received and Filed in the Supreme Court December 17, 1921, at 9:50 o'clock A. M. J. A. Thompson, Clerk. [376]

No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Order for Transmission of Original Exhibit. Filed March 13, 1923. at 2:10 P. M. J. A. Thompson, Clerk. Smith, Warren, Stanley & Vitousek, Attorneys at Law, 404 Bank of Hawaii Building, Honolulu, T. H. Attorneys for Defendant-Plaintiff in Error. [377]

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In the Supreme Court of the Territory of Hawaii.  
No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian Ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Order for Transmission of Original Exhibit.**

To James A. Thompson, Esq., Clerk of the Supreme  
Court of the Territory of Hawaii:

You are hereby authorized and directed, in con-

nection with the writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to transmit as part of the record required by the praecipe of the plaintiff in error the following exhibit, upon its counsel undertaking to return the same to the files of this Court, namely:

1. Plaintiff's Exhibit "N," X-ray Photographic Plates Nos. 1016 and 1017.

Dated: Honolulu, T. H., March 13, 1923.

[Seal] (Sgd.) E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Rec'd copy of the foregoing this 13th day of March, 1923.

(Sgd.) F. PATTERSON,  
Attorney for Plaintiff. [378]

No. 1360. In the Supreme Court of the Territory of Hawaii. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, vs. Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error. Undertaking to Return Original Exhibit. Filed March 13, 1923, at 2:10 P. M. J. A. Thompson, Clerk. Smith, Warren, Stanley & Vitousek, Attorneys at Law, 404 Bank of Hawaii Building, Honolulu, T. H., Attorneys for Defendant-Plaintiff in Error. [379]

In the Supreme Court of the Territory of Hawaii.

No. 1360.

ON ERROR SUED OUT BY THE DEFEND-  
ANT.

MARGARET FRAGA, by ALFRED FRAGA,  
Her Guardian Ad Litem,  
Plaintiff-Defendant in Error,  
vs.

HOFFSCHLAEGER COMPANY, LIMITED,  
Defendant-Plaintiff in Error.

**Undertaking to Return Original Exhibit.**

To James A. Thompson, Esq., Clerk of the Supreme  
Court of the Territory of Hawaii:

We hereby undertake to return to the files of  
the Supreme Court of the Territory of Hawaii  
the following original Exhibit sent to the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit, in accordance with the Order of the Chief  
Justice of the Supreme Court of the Territory of  
Hawaii:

1. Plaintiff's Exhibit "N," X-ray Photographic  
Plates Nos. 1016 and 1017.

Dated: Honolulu, T. H., March 13, 1923.

SMITH, WARREN, STANLEY & VITOUSEK.

Received copy of within undertaking this 13th  
day of March, 1923.

(Sgd.) F. PATTERSON,  
Attorney for Plaintiff-Defendant in Error. [380]

In the Snpreme Court of the Territory of Hawaii.  
No. 1360.

**ERROR TO CIRCUIT COURT, FOURTH CIR-  
CUIT.**

**MARGARET FRAGA**, by **ALFRED FRAGA**,  
Her Guardian Ad Litem,  
Plaintiff-Defendant in Error,  
vs. . . . .

**HOFFSCHLAEGER COMPANY, LIMITED**,  
Defendant-Plaintiff in Error.

**Certificate of Clerk of Supreme Court to Transcript  
of Record and Return to Writ of Error.**

Territory of Hawaii,  
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within writ of error, the original whereof is herewith returned, being pages 350 to 352, both inclusive, of the foregoing transcript, and in pursuance to the praecipe to me directed, a copy whereof is hereto attached, being pages 360 to 364, both inclusive, **DO HEREBY TRANSMIT** to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 336, both inclusive, pages 355 to 357, both inclusive, pages 368 to 370, both inclusive, pages 373 to 376, both inclusive, and pages 379 to 380, both inclusive, **AND I CERTIFY** the same to be full, true and correct copies of the



pleadings, record, entries, exhibits and final judgment which are now on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in the cause entitled in said Court, "Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Plaintiff-Defendant in Error, versus Hoffschlaeger Company, Limited, Defendant-Plaintiff in Error," Numbered 1360. [381]

I DO FURTHER CERTIFY that the original assignment of errors, being pages 337 to 349, both inclusive; the original citation on writ of error, with service thereof, being pages 353 to 354, both inclusive; the original order filed December 19, 1922, extending time until February 20, 1923, for the preparation and transmission of record, being pages 358 to 359, both inclusive, and the original order filed February 9, 1923, extending time until April 5, 1923, for the preparation and transmission of record, being pages 371 to 372, both inclusive, of the foregoing transcript of record are herewith returned.

I FURTHER CERTIFY that pursuant to orders herein filed, copies whereof are hereto attached, being pages 365 to 367, both inclusive, and pages 377 to 378, both inclusive, I do transmit herewith as part of the record in the foregoing entitled cause, the original exhibits, viz:

- (1) Plaintiff's Exhibit "B," X-ray Photographic Plate.
- (2) Plaintiff's Exhibit "C," Photographic Print of X-ray Plate Ex. "B."

- (3) Plaintiff's Exhibit "D," X-ray Photographic Plate.
- (4) Plaintiff's Exhibit "E," X-ray Photographic Plate.
- (5) Plaintiff's Exhibit "F," Photographic Print of X-ray Plate, Ex. "D."
- (6) Plaintiff's Exhibit "G," Photographic Print of X-ray Plate, Ex. "E."
- (7) Plaintiff's Exhibit "H," Photograph of Iron Grating.
- (8) Plaintiff's Exhibit "I," Photographic Print of X-ray No. 1014.
- (9) Plaintiff's Exhibit "J," Photographic Print of X-ray No. 1015.
- (10) Plaintiff's Exhibit "K," X-ray Photographic Plates No. 1014 and No. 1015.
- (11) Plaintiff's Exhibit "L," Photographic Print of X-ray Plate No. 1016.
- (12) Plaintiff's Exhibit "M," Photographic Print of X-ray Plate No. 1017, and
- (13) Plaintiff's Exhibit "N," X-ray Photographic Plates No. 1016 and No. 1017. [382]

I LASTLY CERTIFY that the cost of the foregoing transcript of record is \$274.35, and that said amount has been paid by Messrs. Smith, Warren, Stanley & Vitousek, the attorneys for the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu,

City and County of Honolulu, this 15th day of March, A. D. 1923.

[Seal]                      JAMES A. THOMPSON,  
Clerk of the Supreme Court of the Territory of  
Hawaii. [383]

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[Endorsed]: No. 3997. United States Circuit Court of Appeals for the Ninth Circuit. Hoffschlaeger Company, Limited, Plaintiff in Error, vs. Margaret Fraga, by Alfred Fraga, Her Guardian *ad Litem*, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed March 28, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk. 31

14322











